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In the

Supreme Court of the United States

LIVONIA PROPERTIES HOLDINGS, L.L.C.,
Petitioner,

v.

12840-12976 FARMINGTON ROAD HOLDINGS, L.L.C.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 26, 2011

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QUESTION PRESENTED

Respondent has attempted to foreclose a Mortgage on property owned by Petitioner in Wayne County, Michigan through a non-judicial, summary proceeding called "foreclosure by advertisement" (the alternative being a judicial foreclosure proceeding in a Michigan circuit court). This procedure, which is a contract right set forth in the Mortgage, is regulated by Michigan statute. Case law interpreting this statute requires the recording of "all assignments" of the mortgage with the county register of deeds if someone other than the original mortgagee is attempting to foreclose by advertisement.

There is no dispute that "all assignments" purporting to lead to Respondent are not recorded with the Wayne County Register of Deeds (three assignments, in fact, have not been recorded). It is also a fact that the first transfer on which Respondent relies (to establish that it is the proper party to assert the contractual foreclosure by advertisement right) purported to transfer the Mortgage to another, interim entity at a time when the original mortgagee clearly no longer held the Mortgage (the Mortgage had already been assigned to another entity). Therefore, not only is the information in Register of Deeds relating to this property inaccurate, but the purported "chain of title" on which Respondent relies contains is flawed.

Petitioner instituted this lawsuit to enjoin the Respondent from foreclosing the Mortgage by advertisement. After a Temporary Restraining Order was entered, the District Court denied the request for injunction. Petitioner filed an interlocutory appeal by right to the Circuit Court, which affirmed the District

Court. Embedded in the lower courts' opinions is that it does not matter if the record chain of title is wrong, and Petitioner, which will lose millions of dollars of property, has no standing to complain that the chain of title on which Respondent relies is missing a chain link.

1. Did the District Court abuse its discretion in denying Petitioner's request for an injunction, enjoining the foreclosure of the properties through the summary proceeding of foreclosure by advertisement?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The Petitioner is Livonia Properties Holdings, L.L.C., the Plaintiff in a civil action in the United States District Court for the Eastern District of Michigan (Case No. 10-CV-11589) and the Appellant in the United States Court of Appeals for the Sixth Circuit (Case No. 10-1782).

For Petitioner, there is no parent or publicly held company owning 10% or more of the company's stock.

The Respondent is 12840-12976 Farmington Road Holdings, L.L.C., the Defendant in the United States District Court for the Eastern District of Michigan and the Appellee in the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review: (i) a May 13, 2010 Opinion and Order of the United States District Court for the Eastern District of Michigan Denying Plaintiff's Motion for Preliminary Injunction and Dissolving Temporary Restraining Order; and (ii) an October 28, 2010 Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming the May 13, 2010 Opinion and Order of the District Court.

OPINIONS BELOW

The April 15, 2010 Temporary Restraining Order and Order to Show Cause of the Third Judicial Circuit Court for the State of Michigan (Case Number 10-004441-NZ) is not a reported decision. It is reproduced in **Appendix E**.

The April 22, 2010 Order of the United States District Court for the Eastern District of Michigan Extending Effect of Temporary Restraining Order (Case Number 10-CV-11589) is not a reported decision. It is reproduced in **Appendix D**.

The May 13, 2010 Opinion and Order of the Eastern District of Michigan Denying Plaintiff's Motion for Preliminary Injunction and Dissolving Temporary Restraining Order is a reported decision (717 F. Supp. 2d 724). It is reproduced in **Appendix C**.

The June 15, 2010 Order of the United States Court of Appeals for the Sixth Circuit Denying Appellant's Emergency Motion for Temporary Restraining Order

is not a reported decision. It is reproduced in **Appendix B**.

The October 28, 2010 Opinion and Order of the Sixth Circuit affirming the May 13, 2010 Opinion and Order of the District Court is not a reported decision. It is reproduced in **Appendix A**.

JURISDICTION

Petitioner's appeal to United States Court of Appeals for the Sixth Circuit resulted in an October 28, 2010 Opinion and Order affirming the May 13, 2010 decision of the U.S. District Court.

The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1). The petition is timely pursuant to 28 USC § 2101(c) because the petition was filed within ninety days of the Circuit Court's decision.

STATUTORY PROVISIONS INVOLVED

Mich. Comp. Laws § 600.3204 provides, in relevant part:

> (1) Subject to subsection (4), a party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if

> an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.
>
> . . .
>
> (3) If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage. . . .

STATEMENT OF THE CASE

On April 15, 2010, Plaintiff (and Petitioner) Livonia Properties Holdings, L.L.C. ("Livonia Properties") filed an action against Defendant (and Respondent) Farmington Road Holdings, L.L.C. ("Farmington Road") in the Third Judicial Circuit Court for the State of Michigan ("State Court"), seeking a declaratory judgment and an injunction enjoining Farmington Road, as the purported lender and mortgagee, from selling, "by advertisement," (a process regulated by Michigan statute) four parcels of commercial real estate owned by Livonia Properties. Livonia

Properties also asserted claims of conversion, trespass to chattels, and breach of contract.

On the same day, the State Court entered a Temporary Restraining Order restraining the sale of the parcels, and scheduled a hearing for April 21, 2010 on whether the Restraining Order should ripen into a preliminary injunction. **Appendix E**.

On April 20, 2010, Farmington Road filed a notice of removal with the clerk of the United States District Court for the Eastern District of Michigan ("District Court"), citing diversity of citizenship as the basis for jurisdiction.

On April 22, 2010 the District Court entered an Order Extending the Effect of State Court's Temporary Restraining Order, entered a briefing schedule on the issue of whether the Temporary Restraining Order should ripen into a preliminary injunction, and scheduled a hearing on the motion for May 13, 2010. **Appendix D**.

On May 13, 2010, the District Court, without hearing argument, announced its decision from the bench and issued an Opinion and Order Denying Plaintiff's Motion for Preliminary Injunction and Dissolving Temporary Restraining Order (not served on the parties until May 14, 2010). **Appendix C**.

On June 11, 2010, relying on 28 USC § 1292(a)(1), Livonia Properties filed an interlocutory appeal to the United States Court of Appeals for the Sixth Circuit ("Circuit Court") seeking review of the District Court's May 13, 2010 Opinion and Order.

On June 14, 2010, Livonia Properties filed an Emergency Motion in the Circuit Court seeking to have the Circuit Court set aside the District Court's May 13, 2010 Opinion and Order and requesting that the Circuit Court issue a preliminary injunction enjoining the sale of the parcels.

On June 15, 2010, the Circuit Court entered an Order Denying Appellant's Emergency Motion for Temporary Restraining Order. **Appendix B**.

By way of a June 15, 2010 letter to counsel, the Circuit Court issued a briefing schedule for the appeal.

By way of an August 2, 2010 letter to counsel, the Circuit Court scheduled oral argument for October 15, 2010.

Argument on the appeal proceeded on October 15, 2010.

On October 28, 2010, the Circuit Court issued an Opinion and Order affirming the District Court's Opinion and Order. **Appendix A**.

Livonia Properties has now timely petitioned this Court for a writ of certiorari to the Circuit Court.

STATEMENT OF THE FACTS

On December 2, 2004, Livonia Properties entered into a loan agreement with Lehman Brothers Bank, FSB ("Lehman Brothers"). A Promissory Note ("Note") in the amount of $16,300,000.00 (Sixteen Million Three Hundred Thousand and 00/100) was executed on the same day. ***Refer to*** **Petitioner's April 15, 2010**

Verified Complaint, Exhibit 2 (Promissory Note). A Mortgage ("Mortgage") was also placed on four commercial properties owned by Livonia Properties in Livonia, Michigan to secure payment of the loan. ***Refer to* id. at Exhibit 1 (Mortgage).** The Mortgage was recorded with the Wayne County Register of Deeds on January 24, 2005. ***Refer to* Petitioner's April 29, 2010 Supplemental Brief in Support of Motion for Preliminary Injunction, Exhibit 16 (Title Search) (District Court Docket Number 15).**

The Mortgage grants the lender, upon an event of default, the right to foreclose the Mortgage through a summary, non-judicial procedure "by advertisement." Meaning that the lender can advertise a sale of the mortgaged property, hold a public auction through the county sheriff, and sell the property to the highest bidder to pay the indebtedness owed on Note. This right is regulated by Michigan statute as set forth in Michigan Compiled Laws § 600.3201, *et. seq*. and may only be enforced if the lender proceeds in accordance with those provisions.

Farmington Road claims to be the assignee of the Note and Mortgage (as well as other documents associated with the loan package). Farmington Road claims that:

(i) Pursuant to a January 6, 2005 Assignment, Lehman Brothers assigned the loan documents to LaSalle Bank National Association, as trustee for the registered holders of "LB-UBS Commercial Mortgage Trust 2005-Commercial Mortgage Pass-through

> Certificates, Series 2005-C1" (the "Trust") (***refer to* Petitioner's State Court Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit 7 (Assignment)**); and
>
> (ii) Pursuant to a March 3, 2010 Assignment, the Trust assigned the loan documents to Farmington Road. ***Refer to* id. at Exhibit 8 (Assignment)**.

On January 6, 2005, the Trust did not exist (as will be discussed, it was not formed until February 8, 2005). To that end, the Assignment to the Trust was in blank. An asterisk (i.e., " * ") was marked in the place where the assignee's name would be filled. At some point later on (unknown at this point and Farmington Road refuses to say), a stamp was placed by someone onto the bottom of the Assignment bearing the name of the Trust (in an area designated as a portion to be "intentionally left blank").

The Assignment to the then non-existent Trust was problematic. Michigan law requires present intent to assign contract documents to a specific assignee:

> An assignment is defined as "[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." Black's Law Dictionary (4th ed), p 153. **To constitute a valid assignment there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned**.

Weston v. Dowty, 163 Mich. App. 238, 242; 414 N.W.2d 165 (1987) (emphasis added). And additionally:

> In determining whether an assignment has been made, the question is one of intent. A written agreement assigning a subject matter must manifest the assignor's intent to transfer the subject matter *clearly* and unconditionally *to **the** assignee*."

Burkhardt v. Bailey, 260 Mich. App. 636, 655; 680 N.W.2d 453 (2004) (emphasis added) (quotes and citation omitted).

The Assignment also reveals that it was not filed with the Wayne County Register of Deeds until November 15, 2005, some eleven months after its purported execution.

Farmington Road claims that there has been a default in payment of the Note. To that end, Farmington Road began taking measures to foreclose the Mortgage and sell the properties by advertisement. Farmington Road published notices in a newspaper advising that the sheriff of Wayne County, Michigan would auction the properties to the highest bidder on April 22, 2010. ***Refer to* Verified Complaint, Exhibit 3 (Notice of Sale)**.

After efforts to resolve issues with Farmington Road's legal counsel without judicial intervention were unsuccessful, Livonia Properties initiated an action in the State Court on April 15, 2010. Livonia Properties appeared before the State Court judge on the same day (with Farmington Road's counsel present (i.e., not *ex parte*) seeking a temporary restraining order and a

hearing on a motion for preliminary injunction. In seeking an injunction to enjoin the sale, in addition to other arguments, Livonia Properties contended that Livonia Properties lacked the authority to foreclose the Mortgage by advertisement because Livonia Properties was not properly proceeding in accordance with foreclosure by advertisement statute, the above referenced MCL § 600.3201, *et. seq*.

In spite of the chain of title on which Farmington Road relies (set forth above), there appears to be no dispute that there were at least four transfers of the above referenced loan documents (although Farmington Road initially denied it). This is known based on recitals, statements, representations, and warranties made in a "Pooling and Servicing Agreement" executed on February 8, 2005 between, among others, Structured Asset Securities Corporation II ("SASC II") and the Trust. ***Refer to*** **Supplemental Brief in Support of Motion for Preliminary Injunction, Exhibit 14; and Petitioner's May 27, 2010 Motion for Reconsideration, Exhibit 13 (District Court Docket Number 30)**. These are the transfers that are known to have occurred:

1. At some point after the Mortgage was executed, Lehman Brothers assigned the loan documents to Lehman Brothers Holdings, Inc. ("LBHI"). This assignment is not recorded with the Register of Deeds.

2. On or about January 31, 2005, LBHI assigned the loan documents to SASC II. This assignment is not recorded either.

3. Pursuant to Schedule II(iii) of the Pooling and Servicing Agreement, and as of February 8, 2005, SASC II warranted that it was the owner of the Mortgage and other loan documents, had good title to same, and had the power to sell, assign, and transfer the loan documents.

4. As of the date of the Pooling and Servicing Agreement (February 8, 2005), the Trust was created. Sometime thereafter, SASC II assigned the loan documents to the Trust pursuant to a Mortgage Loan Purchase Agreement (that Farmington Road refuses to produce). Like the prior assignments, this assignment is not recorded.

5. Finally, on March 3, 2010, the Trust purported to assign the loan documents to Farmington Road. The assignment was recorded with the Register of Deeds on March 4, 2010.

Therefore, at this stage, it appears that this is the contract chain:

Date	Ass'or	Transfer	Assignee	Recorded?
12/30/ 2004	Liv. Props.	Mortgage on property	Lehman Brothers	Yes
12/31/ 2004 and 1/30/ 2005	Lehman Brothers Bank	Assignment of Mortgage	LBHI	No
1/31/ 2005	LBHI	Mortgage Loan Purchase Agreement	SASC II	No
On or after 2/8/ 2005	SASC II	Assignment of Mortgage	Trust	No
3/3/ 2010	Trust	Assignment of Mortgage	Farming. Road	Yes

As can be seen, three of these transfers have not been recorded. Not specified in the table is one of the two assignments on which Farmington Road relies – Lehman Brothers to the Trust. While recorded, it is nevertheless a nullity, not only because it was assigned in blank to an entity that did not exist (the Trust), and was assigned at a time when Lehman Brothers no longer owned the Mortgage.

Despite all of the above, on June 16, 2010, Farmington Road proceeded with the foreclosure by advertisement of three of the four parcels (with itself as the high bidder). It is believed that the fourth parcel has yet to be sold.

SUMMARY OF THE ARGUMENT

Based on Michigan's foreclosure by advertisement statute and case law interpreting same, Farmington Road may not foreclose the Mortgage by advertisement, because all of the assignments leading to Farmington Road were not recorded in the record chain of title and one of the assignments on which Farmington Road relies conveyed nothing at all. Under these circumstances, Farmington Road may only resort, if at all, to a traditional judicial action to foreclose the Mortgage. Because Farmington Road has not done that, a preliminary injunction enjoining the foreclosure by advertisement should have been issued. Livonia Properties therefore requests an order voiding the deeds with regard to the three properties that were sold and an order providing that any foreclosure of the properties be enjoined during the duration of the litigation in the District Court.

This case is at the same time ordinary and extraordinary. Ordinary because the banking industry, foreclosure mills, special servicers, and single purpose entities have now made it regular business practice to ignore ordinary principles of contract and assignment law in favor of sloppy transactions. Extraordinary because these entities treat mortgagors (in the toughest economic climate in generations) like deadbeat lawbreakers, and as if the property in which they live and make their livelihoods is insignificant – and worst of all, because so few courts have been willing to step into the thicket to put a stop to it and hold these entities accountable, ignoring property owners' basic due process rights in favor of the finance industry's dismissive mantra that "this is how we do things."

This Court can and respectfully should step into this thicket to put a stop to these practices. And send a clear message to these entities that the era of business as usual is over; and that they, too, are required to justify their chain of ownership before they can take away people's property.

ARGUMENT

MCL 600.3201, *et. seq.* regulates the manner in which a private party may proceed with the streamlined foreclosure by advertisement method (as opposed to the traditional method of judicial foreclosure). The provisions of the statute are automatically part of any mortgage contract: "The theory underlying Michigan's foreclosure by advertisement scheme is that the provisions of the foreclosure by advertisement statute, MCL 600.3201 *et seq.*; MSA 27A.3201 *et seq.*, become a part of the contract between the mortgagor and the mortgagee." *Manufacturers Hanover Mortg. Corp. v. Snell*, 142 Mich. App. 548, 553; 370 N.W.2d 401 (1985).

The material provision for purposes of this appeal is MCL § 600.3204(3), which provides:

> If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.

Farmington Road is not the original mortgagee. Therefore, all of the assignments *evidencing* the assignment from the original mortgagee (Lehman

Brothers) to Farmington Road needed to be recorded with the Register of Deeds before the foreclosure process was initiated. As set forth above, all assignments, by admission of Farmington Road, have not been recorded.

The fact that all the assignments have not been recorded is decisive. The Michigan Supreme Court has consistently held that "The statute concerning foreclosure by advertisement . . . requires as a condition precedent to that procedure a recording of the mortgage, ***and all assignments***." *Arnold v. DMR Financial Services*, 448 Mich. 671, 677 & n.7; 532 N.W.2d 852 (1995), quoting *Feldman v. Equitable Trust Co.*, 278 Mich. 619, 625; 270 N.W. 809 (1937) (emphasis added). Indeed, the Michigan Supreme Court has used strong language in construing this statute, and has required strict compliance with the foreclosure statute: "The right to foreclose by advertisement is conferred solely by the statute, and its provisions must be strictly complied with." *Dohm v. Haskin*, 88 Mich. 144, 147; 50 N.W. 108 (1891). *See also Feldman v. Equitable Trust Co.*, 278 Mich. 619, 623; 270 N.W. 809 (1937). And with direct relevance to this case, the Michigan Supreme Court has held:

> This is not a requirement of supertechnical niceties and details of description. It means only that, the ordinary rules of evidence and interpretation considered, if the record, without the aid of extraneous evidence, does not put the title of the assignee of a mortgage beyond doubt, he cannot foreclose by advertisement. If he cannot remedy the defects in the record, he must resort to foreclosure by action.

Arnold, 448 Mich. at 677 & n. 7. In this way, the Michigan Supreme Court could not be clearer: All assignments means all assignments. Here, the only way to put Farmington Road's "title beyond doubt" is to examine the three aforementioned, unrecorded transfers; which, because they are unrecorded, requires the aid of evidence extraneous to the public record.

Indeed, not only are at least three assignments not recorded with the Register of Deeds, but of the two assignments on which Farmington Road relies, one of them, the purported Assignment from Lehman Brothers Bank to the Trust – which, while recorded with the Register of Deeds – is of no legal significance; because it is known that when Lehman Brothers assigned the loan documents *to* the Trust, Lehman Brothers had already and previously assigned the loan documents to LBHI. Therefore, the first assignment in the "record chain" was executed at a time when Lehman Brothers had no legal interest to *give* the Trust – because the Trust did not even exist until February 8, 2005. So assuming that the assignment was effective on February 8, 2005 at the earliest, the Mortgage had already been assigned to LBHI; and in fact, as of February 8, 2005, SASC II was warranting to everyone that SASC II owned the Farmington Road loan documents.[1]

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[1] This is in addition to the fact that the assignment was executed in blank, filled in later with a stamp by some unknown person (who may not have had the authority to assign for Lehman Brothers), in an area of the assignment the parties designated to be intentionally left blank; at a time when the purported assignee, the Trust, did not exist (in the face of Michigan law which requires a present intent to transfer). *See also U S. Bank Nat'l*

The assignments that *should* have been recorded with the Register of Deeds – the assignments from: Lehman Brothers to LBHI; from LBHI to SASC II; and from SASC II to the Trust (referenced in the Table above) – none of these assignments have been recorded, and yet *these* are the transfers through on which Farmington Road must be relying "evidencing the assignment of the mortgage to the party foreclosing the mortgage" and to establish that Farmington Road has the Mortgage contract right to foreclose by advertisement.

Farmington Road has argued that the assignment mess is cured and its Mortgage rights nonetheless established by the fact that it possesses the Note (based on a legal theory that a mortgage follows indorsement of the note). While that could possibly cure the issue in a *judicial* foreclosure, that would not cure the issue in a foreclosure by *advertisement*, based on the statute's requirement of recordation of all assignments. The argument fails for another reason as well. While mortgages may follow the note, the parties may "agree otherwise." RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 (1997) ("A transfer of an obligation secured by a mortgage also transfers the

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Assoc., as Trustee for the Structured Asset Securities Corporation Mortgage Pass Through Trust v Ibanez, et. al., 08 MISC 384283; 17 LCR 679, 687; 2009 Mass. LCR Lexis 134 (Mass. Land Court October 14, 2009) ("Here, the only entities authorized by the mortgages to exercise the power of sale contained therein are the original mortgagees and the valid assignees of those mortgagees The plaintiffs were neither at the time of notice and sale because, as discussed above, there had never been an assignment of the mortgage to them. The blank mortgage assignments they possessed transferred nothing ")

mortgage unless the parties to the transfer agree otherwise."). The parties *did* agree otherwise. The Pooling and Servicing Agreement required the execution of assignments (and also the recording of them), stating that the documentation to be provided in conjunction was to include:

> an original or a copy of the Mortgage, together with originals or copies of any and **all intervening assignments therein**, in each case, (unless the particular item has not been returned from the applicable recording office), **with evidence of recording** indicated thereon.

***Refer to* id. at Exhibit 13, p. 46, definition of "Mortgage File" (emphasis added)**. Interpreting a similar Pooling Agreement (ironically involving many of these same parties), a Massachusetts court held, "assignments in recordable form to each successive entity were thus required at every step in the securitzation chain." *U.S. Bank Nat'l Assoc., as Trustee for the Structured Asset Securities Corporation Mortgage Pass Through Trust v. Ibanez, et. al.*, 08 MISC 384283; 17 LCR 679, 685; 2009 Mass. LCR Lexis 134 (Mass. Land Court October 14, 2009).[2] In holding that the mortgage therefore was owned by the originator, the court held "[T]he plaintiffs' own securitization documents show that they knew of those requirements, and if they failed to follow them, the

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[2] "I am puzzled at this since, as noted above and discussed more fully below, the plaintiffs' own securitization documents required mortgage assignments to be made to the plaintiffs in recordable form for each and every loan at the time the plaintiffs acquired them." *U.S Bank*, 17 LCR at 683 & n 22

responsibility for the consequences is theirs." *Id.* at 686.

Further support for Livonia Properties' argument is the written interpretation of this statute by Michigan's then-attorney general, which reads, in part:

> It is my opinion, therefore, that **a mortgagee cannot validly foreclose a mortgage by advertisement unless the mortgage and all assignments of that mortgage** (except those assignments effected by operation of law) are entitled to be and **have been recorded**.

Petitioner's Motion for Reconsideration, Exhibit 16 (Michigan Attorney General Opinion No. 7147 dated January 9, 2004) (emphasis added).

This is therefore the attorney general of the State of Michigan – who is charged with enforcing the laws of Michigan – which has the same opinion and interpretation of the statute as Livonia Properties. It ultimately lies with the judiciary to say what the law is, but since the individual with the responsibility to enforce the laws of Michigan holds the same opinion as Livonia Properties, Livonia Properties submits that this opinion should be entitled to significant weight. (This Court regularly solicits *amici* from attorneys general of states or the United States on an issue of law within their respective spheres). Neither the District Court nor the Circuit Court, however, addressed the attorney general's construction. In a diversity case, with the state's top attorney having directly rendered an opinion on Michigan law, Livonia Properties submits that this was an abuse of discretion.

For purposes of the request for the preliminary injunction, since at least three assignments have not been recorded,[3] Farmington Road did not have the authority to foreclose by advertisement and must, if at all, "resort to foreclosure by action." *Arnold*, 448 Mich. at 677 & n. 7. A sheriff's sale that occurs in violation of MCL § 600.3204 passes no title to the purchaser; in this case, Farmington Road (the high bidder for three properties). *See Jackson v. Laker Group, L.L.C.*, 474 Mich. 1014; 708 N.W.2d 374, 375 (2006) (Kelly, J., Dissenting), *citing Bowen v. Brogan*, 119 Mich. 218; 77 N.W. 942 (1899). Therefore, the sales of the three properties should be voided, and this Court should enter a preliminary injunction preventing the sale of the properties during the duration of the litigation.

In denying the motion for preliminary injunction, the District Court nevertheless held that a Michigan Supreme Court decision controlled the outcome in favor of allowing Farmington Road to foreclose the Mortgage by advertisement, the case of *Peterson v. Jacobs*, 303 Mich. 329; 6 N.W.2d 533 (1942), a case decided 53 years before the aforementioned *Arnold* case. **Appendix C, 36a-37a**. It is noteworthy that for all the attribution the District Court gave the *Peterson* case, *Peterson* (like *Dohm*, *supra*) held that compliance with the statutory requirements "means a strict compliance." *Peterson*, 303 Mich. at 335.

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[3] In light of the dizzying number of transfers of loan documents now-a-days, there could be more assignments We don't know yet. Farmington Road refuses to meet an confer for a Rule 26 conference to initiate discovery, and the District Court has yet to order Farmington Road to do so (this case is some seven months old).

The section of the *Peterson* opinion on which the District Court relied was that "slight and inconsequential" irregularities will not defeat the right to foreclose by advertisement. *Peterson*, 303 Mich. at 335. The reference to substantial compliance in *Peterson*, however, had to do with the *notice* required to be given to the mortgagor in a foreclosure. How do we know that? Because that was the only issue before the court. The defendant's argument in *Peterson* was "that the foreclosure proceedings were fatally defective because the assignment of the mortgage to the R.F.C. and its reassignment to defendants ***was not set forth in the notice of sale***." *Peterson*, 303 Mich. at 332 (emphasis added). In *Peterson*, the Michigan Supreme Court was responding to *that* argument:

> We are of the opinion that the mortgage sale was regular and the failure to mention the assignment [in the notice] to R.F.C. and reassignment to defendants was not such a substantial irregularity so as to vitiate the sale.

Id. at 335-36. The actual assignments *were* recorded with the register of deeds; that the *notice of sale* neglected that information was what was "slight and inconsequential." The distinction matters because no one could put the mortgagee's title "beyond doubt" in *Peterson*, because a title search with the register of deeds would reflect the transfers leading to the foreclosing mortgagee.

In this way, the *Peterson* Court was not giving mortgagees *carte blanche* to be sloppy with the public record and ignore basic elements of the foreclosure statute – like recording the assignments through which the mortgagee-assignee claims its rights. Mich.

Comp. Laws § 600.3204(3). As *Arnold* makes clear, one of the purposes of recordation as expressed by the Michigan Supreme Court is to put the foreclosing party's title "beyond doubt"; how can the foreclosing party do that if the assignments through which it claims its right to foreclose are not recorded? (Especially, as in this case, when it is known that the first assignment did not transfer any rights at all).[4] The District Court's reliance on *Peterson* and any additional *dicta* as support for its refusal to enter the injunction was an error of law.

Even if there were a "substantial compliance" exception under Michigan law (e.g., one that extends beyond the public notice provisions of the statute), this is immaterial because, as argued earlier, the Michigan Supreme Court has held that "all assignments [must be recorded]." *Arnold*, 448 Mich. at 677 & n.7. Livonia Properties submits that a defect or irregularity with regard to the recordation of the assignments of the mortgage leading to the foreclosing mortgagee is so fundamental that it could never be construed as "substantial compliance" with the foreclosure statute. *It is an element of MCL § 600.3204*. Therefore, as a matter of law, it could never be held that Farmington Road "substantially complied" with the statute because the assignments through which Farmington Road is asserting its contract rights were not recorded.

Additionally, the lower courts' interpretation that "record chain of title" only means those assignments filed in the public record – even if the record chain is *wrong* and even if additional assignments are known

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[4] *Refer supra*, n 1

to exist and should have been recorded – was an improper interpretation of the statute. That would mean that anyone could forge an assignment document and file it against the property and begin foreclosure by advertisement proceedings; and the courts of the United States would be closed to the mortgagor to stop the process.

The circularity of what is the record chain of title, in the limited interpretation by the low courts, is confounding. The record chain of title will always be exactly as it is. Shouldn't it be *correct*? Even if *Arnold* had never been decided, wouldn't *that* be the more rationale interpretation of the Michigan legislature's meaning? The recording requirements imposed by foreclosure by advertisement statute (which, incidentally, are not difficult) means very little if it does not matter if it's accurate. The Sixth Circuit nevertheless held:

> In this case, the recorded documents show a transfer from Lehman Brothers to the Trust and another from the Trust to Farmington. These transfers were found in Livonia's own title search, which Livonia offered as an exhibit in its original brief to the district court. This record shows a clear chain of title from the original mortgagee to Farmington.

Appendix A, 7a-8a. True, Livonia Properties' title search showed the purported transfer from Lehman Brothers to the Trust and the transfer from the Trust to Farmington Road. But that does not mean that the chain of title as expressed in the public record is accurate. While the chain may be "clear" or even logical – we all know it's wrong, because the Lehman

Brothers transfer to the Trust conveyed nothing. And the Trust (which later assigned its rights to Farmington Road) took its rights from SASC II – an assignment that was not recorded. Livonia Properties submits that the best and most rationale interpretation of the statute is that mortgagees may foreclose a mortgage through this streamlined, non-judicial method of advertisement if, *but only if*, the record connects all the dots showing that the right to foreclose by advertisement and that the Mortgage passes from point A to point B (and so on), leading to the foreclosing mortgagee. That gives assurance to the legislature that the party foreclosing actually has the contract right to do so. On the other hand, the lower courts' interpretation of the statute in essence eschews that purpose in favor of an interpretation that the Michigan legislature, in drafting the statute, did not care what the record says or whether it's inaccurate.

The Circuit Court's reliance on the *Arnold* case as *support* for its holding was respectfully in error as well. The statements from the *Arnold* Court are set forth substantially above and need not be repeated. The Circuit Court relied on a single statement from *Arnold* that "unrecorded interests 'did not create a valid objection on behalf of the mortgagor if the mortgagor was unaffected by those interests.' 532 N.W.2d at 856." **Appendix E, 7a-8a** The *Arnold* Court was speaking of unrecorded ***security*** interests in real estate. The assignments here were for the whole interest, not just a security interest, a fact that the Circuit Court even acknowledged. **Appendix E, 7a-8a** ("One point of distinction between *Arnold* and the present matter is that the foreclosing party in *Arnold* had assigned only a security interest in the mortgage rather than all of its rights. In contrast, the

mortgage between Livonia and Lehman Brothers appears to have passed in its entirety through two entities associated with the PSA before being titled to the Trust."). *Arnold's* limitation was only as to unrecorded security interests – not unrecorded assignments of the whole interest. Assignments of security interests need not be recorded; assignments of the whole interest *do*. Michigan law has never held otherwise.

In light of all of the above and consideration of the caselaw, the decisions of the District Court and the Circuit Court impose federalism costs because federal courts sitting in diversity, which are bound to apply state law based on state precedent under the *Erie* doctrine, are in essence creating a body of federal common law with regard to interpretations of Michigan statute and Michigan cases; regardless of the decisions of the Michigan Supreme Court. Had this case remained in the state system, Livonia Properties submits that based on the discussion above, Livonia Properties would have been successful in its prayer for injunctive relief. The State Court's entry of the broad Temporary Restraining Order is at least some evidence of that.

On a final point, in an era where mortgage factories and special servicers have run amok, where sloppiness is the rule and not the exception, where loan documents are assigned (often in blank, as in this case) multiple times, and oftentimes even the banks don't know where loan documents are, it is a crisis that more and more courts have closed the judicial doors on mortgagees to challenge the standing of the foreclosing mortgagee. In a case where it is known for certain that the public record is wrong (e.g., the Trust did not

take its rights from Lehman Brothers Bank; it took rights from SASC II), where assignments are in blank, when assignments are created to entities that don't exist, when assignments are back-dated – for the lower courts in this case to essentially say that it is no business of the mortgagor to inquire into who owns the indebtedness and mortgage rights and to say, in essence, "we don't care" if the public record is wrong denies basic due process rights. A foreclosure by advertisement statute, like the one in Michigan, is reserved for clean and clear assignments of mortgages, and for mortgagees who can point to the public record and truthfully connect the dots to the foreclosing mortgagee. Farmington Road cannot do that.

For what it's worth, Farmington Road has a remedy: it can begin a judicial foreclosure proceeding.[5] These foreclosure mills, however, don't want to do that because they know their paperwork is often a mess, a fact which has surfaced more publicly in the past year (e.g., Bank of America's temporary moratorium on foreclosures). "[B]ecause of the careless--some might say 'reckless'--behavior seemingly endemic to the mortgage industry and entities servicing those loans, courts have been forced to expend time and resources to sort through mortgage loan histories." *In re Hudak*, Bankruptcy Case No. 08-10478-SBB; 60 Collier Bankr. Cas. 2d (MB) 1354, *11 (Bankr. D. Col. October 24, 2008). Unfortunately, these banks have convinced courts, perhaps out of the mind-numbing complexity of

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[5] Or Farmington Road could record the interim assignments, like the one from Lehman Brothers Bank to LBHI, the one from LBHI to SASC II, and the one from SASC II to the Trust (and anything else that exists between or thereafter).

it all, to abandon examination of the trail of these assignments in favor of the aforementioned condescending mantra that "this is how it's done." Fortunately, not all courts have succumbed to the industry:

> The mortgage lender, its affiliates, assignees, and agents involved in this case, through the convoluted process of securitization, the submission of a 191-page, incomplete [Pooling and Service Agreement], and reliance upon back-dated, unrecorded assignments, have confounded the identity of the current holder of the mortgage . . . . The Court and the Debtor are entitled to insist that the moving party establish its standing in a motion for relief from stay through the submission of an accurate history of the chain of ownership of the mortgage."

In re Hayes, 393 B.R. 259, 269; 2008 Bankr. Lexis 2191 (Bankr. D. Mass. August 19, 2008). Not enough courts, however, are willing to hold the big banks accountable, including the courts in which Livonia Properties is a party. We have in essence been denied substantive judicial review of the process of these transactions – by which we are affected – and denied any discovery or even the right to inquire into these matters. Mortgagors are the victims of this Wild West. Just because "Too-Big-To-Fail" banks are involved should not result in what is too often ending in rubber stamp justice.

As stated earlier, this case is ordinary and extraordinary, and is exactly the type of case over which this Court should exercise jurisdiction to

address systemic problems in the mortgage industry in connection with the transfers and assignments of mortgages.

CONCLUSION

For the foregoing reasons, Petitioner Livonia Properties Holdings, L.L.C. respectfully requests that the Court grant its petition, and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 10-1782

[Filed October 28, 2010]

LIVONIA PROPERTIES HOLDINGS, LLC,

Plaintiff-Appellant,

v.

12840-12976 FARMINGTON ROAD HOLDINGS, LLC,

Defendant-Appellee.

BEFORE: MERRITT, ROGERS, and SUTTON, Circuit Judges.

ROGERS, Circuit Judge. Plaintiff Livonia Properties Holdings, L.L.C. appeals the district court's denial of a request for a preliminary injunction of the foreclosure by advertisement of four properties for which Livonia had defaulted on its mortgage

obligations. The district court denied the request for a preliminary injunction after determining that Livonia did not have a strong likelihood of success on the merits, Livonia was not likely to suffer irreparable harm without the injunction, any harm caused to Livonia by refusing to enjoin the foreclosure did not clearly outweigh the harm to others that would be caused by enjoining the foreclosure, and an injunction would not serve the interests of public policy. An evaluation of the preliminary injunction factors shows that the court did not abuse its discretion in denying the injunction.

Livonia owns (or recently owned) four commercial properties in Livonia, Michigan. In December 2004, Livonia used these properties to secure a $16,300,000 commercial mortgage loan with Lehman Brothers Bank, FSB. Lehman Brothers executed an assignment of the loan on or around January 6, 2005, effective January 11, 2005 (the "First Assignment"). The assignment documents show that the loan was transferred from Lehman Brothers to LaSalle Bank National Association as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C-1, Commercial Mortgage Pass-Through Certificates, Series 2005-C1 (the "Trust"). The First Assignment was recorded with the Wayne County Register of Deeds on November 17, 2005.

The public record shows only an assignment from Lehman Brothers to the Trust. However, Livonia has provided evidence that the First Assignment was actually accomplished through a series of interim, short-term transfers rather than a direct transfer between the parties. These transfers have been

acknowledged by defendant, Farmington Road Holdings, and are as follows:

1. On or about January 6, 2005, effective January 11, 2005, Lehman Brothers sold the loan to Lehman Brothers Holdings Inc. ("LBHI");

2. On or about January 31, 2005, LBHI transferred the loan to Structured Asset Securities Corporation II ("SASCII");

3. On or about February 10, 2005, SASCII deposited the loan into the Trust.

Livonia discovered these interim assignments through an Internet search that revealed a Pooling and Servicing Agreement ("PSA") describing the interim transfers that were used to establish the Trust. Farmington acknowledged at oral argument that the First Assignment was executed "in blank" (to be completed later) and was later completed to identify the Trust as Lehman Brothers' assignee.

On February 17, 2010, the Trust created the defendant entity, Farmington, for the purpose of foreclosing on the mortgaged properties. The trustee assigned the loan to Farmington on or about March 3, 2010 (the "Second Assignment"). The Second Assignment was recorded with the Wayne County Register of Deeds on March 4, 2010. Farmington then began the process of foreclosure by advertisement, a method of non-judicial foreclosure permitted under Michigan law. Mich. Comp. Laws Ann. § 600.3204. Livonia contested the foreclosure in Michigan state court, and Farmington removed the matter to federal court. The district court extended the state court's

grant of a temporary restraining order while considering Livonia's motion for a preliminary injunction.

On appeal, Livonia contends that Farmington is not in compliance with the statute's requirement that a foreclosing mortgagee who is not the original mortgagee must hold record chain of title to the property in question. The basic assertion is that because the interim transfers of January 2005 were never recorded, the record chain of title is defective and Farmington cannot foreclose on the properties by advertisement. The district court correctly determined that Livonia did not have a strong likelihood of success on the merits of its record-chain-of-title claim and dissolved the TRO. Livonia next filed a motion for reconsideration, which the district court denied. Farmington has sold three of the four properties pursuant to the foreclosure by advertisement statute. Livonia now appeals.

As an initial matter, Farmington contends that Livonia's request that the sales that have already occurred be set aside is not properly before this court. Farmington argues that the request was not before the district court on the motion for preliminary injunction, but Farmington does not acknowledge that the TRO barred foreclosure, so there were no sales for the district court to set aside. All of the relevant issues of law required to award either form of relief, an injunction or voiding of the sales, were presented below, and Livonia has not modified those claims on appeal. Livonia is not attempting to introduce a new claim on appeal, but has merely adjusted the form of relief requested to conform to the current

circumstances. The request has been properly presented to this court.

Farmington also contends that Livonia's petition is partially moot because three of the four mortgaged properties have already been sold through the foreclosure by advertisement process, but this argument is also without merit. Farmington's sole support of its position is a quote taken out of context from Wright's *Federal Practice and Procedure* treatise, which states that "[i]f the district court has denied an injunction and there has been no stay, defendant is free to take the action sought to be enjoined, and if the event sought to be enjoined transpires before the appeal is heard, the appeal will be dismissed as moot." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2904. We have found no additional support for this proposition, and Farmington has not argued that we would be unable to provide Livonia any relief in this appeal. *See Coalition for Gov't Procurement v. Fed. Prison Indus.*, 365 F.3d 435, 460 (6th Cir. 2004) ("the determinative factor in the mootness inquiry is whether the court possesses the authority to afford [the party seeking reversal] any effectual relief").

The key issue on appeal is the meaning of "record chain of title" under Michigan's foreclosure by advertisement statute. Mich. Comp. Laws Ann. § 600.3204. The relevant statutory language states: "[i]f the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage." Mich. Comp. Laws Ann.§ 600.3204(3). Livonia contends that because the PSA was never recorded and two parties to the PSA are not reflected

in the recorded documents, the record-chain-of-title requirement is not satisfied. Livonia's basic assertion is that a Michigan mortgage may only be foreclosed by advertisement if every interim assignment between the original lender and the foreclosing party is revealed by the public record. Livonia's interpretation, however, is not in accordance with the case law.

Livonia offers no definition of the term "record chain of title" and interchanges the phrase with "chain of title" throughout its brief. A search of Michigan case law and property treatises has not revealed a definition of either term, but the phrase is plain on its face and was reasonably defined by the district court in its opinion denying Livonia's motion to reconsider: "record chain of title is comprised of documents that were filed in the County Register of Deeds' office."[1]

In this case, the recorded documents show a transfer from Lehman Brothers to the Trust and another from the Trust to Farmington. These transfers were found in Livonia's own title search, which Livonia offered as an exhibit in its original brief to the district court. This record shows a clear chain of title from the

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[1] Farmington's appellate brief refers to an affidavit of Dennis W. Hagerty, a 23-year member of the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan in which Mr. Hagerty explains the meaning of the term "record chain of title." Livonia contends that this affidavit is not properly considered by this court because it was not before the district court at the time that court ruled on the preliminary injunction. There is no need to examine Livonia's claim on this point because the Hagerty affidavit is not necessary to a determination of the meaning of "record chain of title" and was not relied on by this court in determining the meaning of the phrase.

original mortgagee to Farmington. Although Livonia has not articulated any alternative definition of "record chain of title," its argument clearly rests on the position that the term includes any and all interests in the property ever held by any individual or entity. This position is not supported by the case law.

The most recent Michigan case in which a plaintiff has attempted to challenge a foreclosure by advertisement based on unrecorded assignments is *Arnold v. DMR Financial Services, Inc* , 532 N.W.2d 852 (Mich. 1995). In that case, DMR, the financial institution foreclosing on the mortgage, had granted a security interest in the mortgage to another entity, which did not record its interest. The foreclosed party argued that the foreclosure was not carried out in accordance with the statute because the security assignment was not within the chain of title. The Michigan Supreme Court disagreed, restating its long-held position that "the presence of an unrecorded security assignment was irrelevant." *Id.* at 856. *Arnold* actually involved a prior version of the foreclosure-by-advertisement statute that said that *all* assignments must be recorded. *Id.* at 855. Even under that stronger language, which is clearly more favorable to Livonia's position than the current requirement that the foreclosing party have "record chain of title," the Michigan Supreme Court was clear that the lack of recordation did not invalidate the foreclosure.

One point of distinction between *Arnold* and the present matter is that the foreclosing party in *Arnold* had assigned only a security interest in the mortgage rather than all of its rights. In contrast, the mortgage between Livonia and Lehman Brothers appears to have passed in its entirety through two entities

associated with the PSA before being titled to the Trust. However, this distinction does not undermine *Arnold*'s relevance to the case at hand. The *Arnold* court emphasized that unrecorded interests "did not create a valid objection on behalf of the mortgagor if the mortgagor was unaffected by those interests." 532 N.W.2d at 856. Livonia has not argued that the intermediate transfers related to the PSA have in any way affected Livonia's rights or responsibilities related to the mortgage. In fact, it appears that the only interests impaired by the lack of recordation were those of LBHI and SASCII during the brief time those entities held the loan. Had either attempted to foreclose, Livonia would have had a valid record-chain-of-title objection.

The district court opinion emphasizes that Farmington at least substantially complied with the statutory requirements for record chain of title and that substantial compliance is all that is required under the statute. *Livonia Prop. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*, No. 10-11589, 2010 WL 1956867, at *16-18 (E.D. Mich. May 13, 2010). Livonia argues that the district court misinterpreted the law because the statute actually requires strict compliance. The case law supports the district court's position that substantial compliance is sufficient. *Peterson v. Jacobs*, 6 N.W.2d 533, 536 (Mich. 1932). However, the issue does not require further discussion because Farmington appears to be in full compliance with the statute. Both Farmington and Livonia have produced documents revealing that the public records show the mortgage passing from Lehman Brothers to the Trust to Farmington, and the plain language of the statute appears to require nothing more.

Livonia also asserts that Farmington must prove that the assignment between Lehman Brothers and the Trust is legally valid in order for Farmington's chain of title to be valid. Livonia contends that the assignment from Lehman Brothers to the Trust may be invalid because the Trust did not actually exist as of January 6, 2005, the date entered on the transfer instrument. Livonia bases this claim on the PSA, which created the Trust but was not executed until February 8, 2005. The argument, as articulated on appeal, is that the Trust could not have actually received the mortgage on January 6, 2005, and as a result, the assignment was invalid, making the record chain of title invalid. As a preliminary matter, Livonia has presented no authority for the proposition that the record chain of title is destroyed by an irregularity affecting the validity of a transfer. Even if the transfer were invalidated, the public record would remain as it is, and the record chain of title would not be disturbed.

Regardless of this point, even if there were a flaw in the assignment, Livonia does not have standing to raise that flaw to challenge Farmington's chain of title. As recognized by the district court, there is ample authority to support the proposition that "a litigant who is not a party to an assignment lacks standing to challenge that assignment." 2010 WL 1956867, at *9. An obligor "may assert as a defense any matter which renders the assignment absolutely invalid or ineffective, or void." 6A C.J.S. *Assignments* § 132 (2010). These defenses include nonassignability of the instrument, assignee's lack of title, and a prior revocation of the assignment, none of which are available in the current matter. *Id.* Obligors have standing to raise these claims because they cannot otherwise protect themselves from having to pay the

same debt twice. *Id.* In this case, Livonia is not at risk of paying the debt twice, because Farmington has established that it holds the original note. Farmington has produced ample documentation that it was in possession of the note and had been assigned all rights therein prior to the initiation of foreclosure proceedings. The district court reviewed the copies in exhibits and the originals produced by Farmington and was satisfied that they were authentic. Without a genuine claim that Farmington is not the rightful owner of the loan and that Livonia might therefore be subject to double liability on its debt, Livonia cannot credibly claim to have standing to challenge the First Assignment.

Michigan case law provides further support for the district court's conclusion that Livonia lacks standing to challenge the assignment. In *Bowles v. Oakman*, 225 N.W. 613 (Mich. 1929), the Michigan Supreme Court held that the maker of a promissory note could not challenge his obligations under the note by asserting that an invalid assignment had occurred. *Id.* at 614. The court emphasized that the challenge to the transfer was inappropriate where the maker "had no defense of his own to the note." *Id.* The *Bowles* decision then quotes *Gamel v. Hynds*, 125 P. 1115 (Okla. 1912), for the point that "the maker cannot defend or set up matters of defense which only exist between the indorser and indorsee." 225 N.W. at 614. More recently, the Michigan Court of Appeals determined that a lessee of property did not have standing to challenge the lessor's assignment of certain rights in the lease to a subsequent purchaser because "the parties to the assignment . . . [did] not contest its validity." *Pashak v. Interstate Highway Constr.*, No. 189886, 1998 WL 2001203, at *1 (Mich. App. Mar. 20,

1998). In the instant case, if the assignment were in fact irregular, that would be an issue between the assignor and assignee, not between Livonia and Farmington.

Livonia has attempted to distinguish itself from the unsuccessful obligors described above by emphasizing that its challenge of the First Assignment is not meant to "challenge the underlying obligation," but rather to challenge the record chain of title. That is, Livonia contends that a defective assignment corrupts the record chain of title and that Livonia's challenge is only of Farmington's standing to foreclose under the statute. Livonia's brief cites several cases in which obligors have raised chain of title challenges (often unsuccessfully) for the proposition that Livonia has standing to assert this claim. Livonia further argues that because the statute requires the foreclosing party to hold record chain of title, a debtor must be able to challenge the record chain of title as a means of avoiding foreclosure. Livonia is correct that a party subject to foreclosure has standing to challenge whether a lender holds record chain of title, but that determination is limited to an examination of the public records. In its opinion on Livonia's motion to reconsider, the district court clarified this difference, pointing out that Livonia "acknowledges that a *record chain of title* exists" but is "unsatisfied with the *record chain of title*." 2010 WL 1956867, at *18. Because Livonia finds no claim in the public records, it is seeking to "go beyond the statutory requirements to inspect each and every aspect of every contract or agreement" in the history of the loan. *Id.* at *16.

As noted by the district court, even if Livonia did have standing to contest the First Assignment and the

assignment were in fact invalid, Livonia would still be unlikely to succeed on the merits. 2010 WL 1956867, at *10. Any claim by Livonia that Farmington or the Trust before it was not a valid assignee of the mortgage rings hollow, as Livonia made mortgage payments directly to the Trust for years without questioning the Trust's right to receive payment. Further, when Livonia first encountered difficulties in repayment, it entered into a prenegotiation agreement with the Trust. Standing alone, the existence of that agreement makes Livonia's current questioning of the mortgage's ownership or assignments appear disingenuous, but the agreement's specific terms further weaken the claim. In the agreement, Livonia expressly acknowledged that "[t]he Loan Documents are in full force and effect and are binding on the Borrower in accordance with their terms." R.16-19 at 3. Even if Livonia had standing, therefore, Farmington would likely have valid equitable defenses of estoppel and laches based on Livonia's prior actions.

Livonia also alleges that the district court relied on a clearly erroneous finding of fact in denying the injunction. Livonia places great emphasis on the fact that the original district court opinion identified SASC as a party to the PSA, 2010 WL 1956867, at *1, when the actual party was in fact SASCII, a separate entity. Livonia "submits that this error by the District Court warrants reversal of its denial of [Livonia's] request for a Preliminary Injunction because there is no evidence that exists that demonstrates the actual chain of title." But, as already discussed, there is evidence of the record chain of title, some of which Livonia itself provided in the form of the title report. The district court properly relied on this evidence in considering Livonia's likelihood of success on the merits.

Livonia does not assert, and there is no evidence in the district court opinion, that the court relied in any way on the identity of SASC or SASCII in its decision to deny the injunction. Livonia brought the error to the district court's attention in its motion for reconsideration, and the district court acknowledged and disposed of the point in its opinion on that motion. The district court restated its position that Livonia lacked standing to challenge the interim transfers, recorded or unrecorded, regardless of what entities were involved. The district court's interpretation of the statute supports the conclusion that the court did not rely on the identities of specific interim parties in determining that an injunction was unwarranted. The district court correctly rejected all of Livonia's claims regarding "record chain of title," and properly concluded that Livonia had little likelihood of success on the merits.

Further, the district court's weighing of the other three preliminary injunction factors did not constitute an abuse of discretion. Livonia has limited its specific assertions on appeal to claims related to its likelihood of success on the merits and has not alleged any error in the district court's analysis of the other three factors. Review of the opinion reveals no such error, much less the clear error required to find an abuse of discretion.

The district court found that Livonia was unlikely to suffer irreparable harm as a result of the denial of the preliminary injunction. It specifically identified two bases for its conclusion, neither of which is clearly erroneous. First, it concluded that the alleged harms Livonia would suffer from foreclosure were the direct result of Livonia's default on the loan and emphasized

that self-inflicted harm is not the type that injunctions are meant to prevent. 2010 WL 1956867, at *12 (citing 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1). Second, the court noted Michigan's statutory right of redemption, which allows a borrower subject to foreclosure to satisfy the debt and reclaim the property for six months after the sale. Because Livonia would still have the redemption right, any harm it might suffer from foreclosure was not irreparable. 2010 WL 1956867, at *13.

With regard to whether an injunction would cause harm to others, the district court determined that Livonia had not shown that any harm it would suffer if the injunction were denied would decidedly outweigh any harm that granting the injunction would cause to Farmington. *Id.* The district court did not put substantial weight on this factor because the court considered the first and second factors to be "critical" in the injunction determination and had found that both factors pointed against granting an injunction. Livonia has not referred to any evidence of harm that the district court failed to consider, and there is no clear error in its conclusion regarding the relative harms or its weighing of this factor.

The district court concluded that the public policy factor weighed against granting an injunction because Livonia had contractually agreed to foreclosure by advertisement in the event of default. *Id.* The court's conclusion that public policy does not favor allowing a borrower to avoid its contractual obligations, particularly "where it cannot satisfy the other [preliminary injunction] factors," *id.* at *13, did not rely on any erroneous findings of fact or misapplication of law and does not constitute an abuse of discretion.

We therefore affirm the district court's order denying a preliminary injunction.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 10-1782

[Filed June 15, 2010]

LIVONIA PROPERTIES HOLDINGS, LLC,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
12840-12976 FARMINGTON ROAD HOLDINGS, LLC,	)
	)
	)
Defendant - Appellee.	)
	)

ORDER

Before: BOGGS and KETHLEDGE, Circuit Judges; GRAHAM, District Judge.*

Livonia Properties Holdings, LLC ("Livonia"), appeals the district court's order denying its motion for a preliminary restraining order and dissolving a

* The Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

temporary restraining order issued by the state court from which this action was removed. In an emergency motion, Livonia asks this court to set aside that order and to enjoin a foreclosure by advertisement that is scheduled to occur on June 16, 2010. The defendant and initiator of the foreclosure proceedings, 12840-12976 Farmington Road Holdings, LLC ("Farmington"), opposes the motion.

Given the constraints of time, we consider Livonia's motion as one for an injunction pending appeal. Such an injunction is within this court's power to grant. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Id.* We examine four factors: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Id.* at 573. *See also Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002).

Upon consideration, we decline to enter an injunction. Livonia's harm is economic and thus does not support an injunction. *Overstreet*, 305 F.3d at 578. Further, the Michigan period for redemption following a foreclosure also leads to a conclusion that Livonia's harm is not irreparable. In any event, the harm flows from Livonia's default, not the foreclosure. As to the likelihood of success, an applicant for a stay or injunctive relief "is always required to demonstrate

more than the mere 'possibility' of success on the merits." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (citation omitted). Upon review and consideration, we cannot conclude that Livonia has done so.

Therefore, the emergency motion for injunctive relief is **DENIED**. The clerk is directed to expedite the briefing and submission of this appeal.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 10-11589
Hon. John Feikens

[Filed May 13, 2010]

LIVONIA PROPERTY HOLDINGS, L.L.C.,	)
	)
Plaintiff,	)
	)
v.	)
	)
12840-12976 FARMINGTON ROAD HOLDINGS, L.L.C.,	)
	)
	)
Defendant.	)
	)

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DISSOLVING TEMPORARY RESTRAINING ORDER

I. PROCEDURAL HISTORY

This matter is before the court on Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. The case was initially filed in the Circuit

Court for the County of Wayne, Michigan, Case No. 10-004441-NZ. Judge John H. Gillis Jr. issued a Temporary Restraining Order ("TRO") on April 15, 2010, and scheduled a hearing for April 21, 2010 to determine whether a preliminary injunction should issue. On April 20, 1010, Defendant Lender properly removed the action to this court on diversity grounds. I extended the effect of the TRO to May 14, 2010, scheduled a hearing for May 13, 2010, and requested supplemental briefing on certain questions. The matter has been fully briefed and a hearing was held on May 13, 2010.

II. MATERIAL FACTS

A. The Original Mortgage And Note To Lehman Brothers

On December 2, 2004, Plaintiff Livonia Properties Holdings, L.L.C. ("Borrower") entered into a $16,300,000 Commercial Mortgage Loan (the "Loan") from Lehman Brothers Bank, FSB ("Lehman Brothers"). The Loan was secured by a Mortgage on four industrial properties in Livonia, Michigan (the "Properties"). The documents executed and delivered by Borrower in connection with the Loan include, but are not limited to, a Promissory Note (the "Note"), Mortgage, and Cash Management Agreement (collectively, the "Loan Documents").

The Loan was disbursed on December 30, 2004, leaving over $5.5 million dollars for Borrower after other disbursements.

B. The Initial Assignment(s) To The Trust

On or about January 6, 2005, effective January 11, 2005, Lehman Brothers executed an assignment of the Loan Documents (the "First Assignment"). Borrower alleges, and Lender appears to concede, that the First Assignment was actually accomplished by way of three interim transfers, occurring over approximately one month:

1. On or about January 6, 2005, effective January 11, 2005, Lehman Brothers sold the Loan to Lehman Brothers Holdings Inc. ("LBHI");

2. On or about January 31, 2005,[1] LBHI transferred the Loan to Structured Asset Securities Corporation ("SASC");

3. On or about February 10, 2005,[2] SASC deposited the Loan into the Trust (as defined below).

Ultimately, the Loan Documents were assigned to LaSalle Bank National Association, as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C1, Commercial Mortgage Pass-Through

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[1] According to certain representations in a Pooling and Servicing Agreement ("PSA") effective as of January 11, 2005 (executed February 8, 2005), the transfer from LBHI to SASC occurred pursuant to a Mortgage Loan Purchase Agreement dated January 31, 2005 The PSA established the Trust and provided for SASC's deposit of certain Loans thereto.

[2] The PSA indicates that the Trust's pass-through certificates were to be issued on February 10, 2005.

Certificates, Series 2005-C1 (the "Trust"). The documents executed and delivered by Lehman Brothers in connection with the First Assignment include, but are not limited to, an Allonge, an Assignment/Transfer of (Lien of) Mortgage/Deed to Secure Debt/Beneficial Interest Under Deed of Trust ("First Mortgage Assignment"), and an Assignment of Mortgage Loan Documents (collectively, the "First Assignment Documents").

It does not appear that separate assignments were executed to reflect each interim transfer. Instead, the First Assignment Documents, including the First Mortgage Assignment and the Allonge, list Lehman Brothers as Assignor and the Trust as Assignee. Lender suggests that the assignments were executed "in blank" – apparently contemplating the ultimate assignment to the Trust – and later filled in to identify the Trust as the Assignee.

The First Mortgage Assignment was recorded with the Wayne County Register of Deeds on November 17, 2005.

As discussed more fully below, Borrower argues that the missing interim assignments (reflecting LBHI and SASC as assignees) render the "record chain of title" fatally defective and preclude foreclosure by advertisement by any party.

C. Borrower's Payment History

Beginning in February 2005, Borrower made over $5,000,000 in payments to the Trust, until its default in October, 2009. During this time, Borrower never questioned the validity of the First Assignment.

D The Prenegotiation Agreement

On December 22, 2009, Borrower entered into a Prenegotation Agreement with the Trust. In the Agreement Borrower expressly acknowledged that (a) the Trust was the Holder of the Loan Documents; (b) the Loan Documents "are in full force and effect and are binding on the Borrower in accordance with their terms"; (c) "the Loan Documents continue to constitute Borrower's legal and enforceable obligations; and (d) Borrower "currently holds no claim against Holder . . . by virtue of any action(s) or inaction(s) of Holder or any of its predecessors-in-interest, if any."[3]

E. The Loan Acceleration

On January 14, 2010, due to Borrower's default, the Trust accelerated the maturity of the Note and invoked the default rate of interest, effective as of October 12, 2009. As of January 10, 2010, the amount due and owing on the Loan was $17,846,855.93, including principal, interest, prepayment consideration and late charges.

F. The Assignment To Defendant Lender

On February 17, 2010, the Trust created the Defendant entity ("Lender"). The Loan Documents

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[3] Borrower questions Lender's "poor judgment" in attaching the Agreement, claiming it is confidential for all purposes. The court reads the Agreement to indicate that the content of any negotiations pursuant to this document are confidential, but Borrower cannot avoid the waivers and admissions made within the document itself.

were assigned to Lender on or about March 3, 2010 by way of, among other documents, a Second Allonge, an Assignment of Mortgage, a General Assignment, and an Assignment of Claims (collectively, the "Second Assignment Documents").

The Assignment of Mortgage (the "Second Mortgage Assignment"), listing the Trust as Assignor and Lender as Assignee, was recorded with the Register of Deeds on March 4, 2010.

Before the hearing on this matter, Lender produced the originals of the Loan Documents, the First Assignment Documents, and the Second Assignment Documents.

G. The Cash Management Agreement

Under the terms of the Cash Management Agreement, Borrower pledged substantial cash reserves to be held so long as a certain judgment remained unpaid. The agreement was to terminate upon notice to Lender that the judgment was deemed satisfied by a court of competent jurisdiction.

On March 1, 2010, a judge ordered that the judgment was satisfied. On March 4, 2010, Borrower provided notice of satisfaction to Lehman Brothers "and counsel for [Lender]"[4] and requested that the remaining cash reserves be immediately released to Borrower.

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[4] Again, this suggests that Borrower recognized Lender's status as assignee and holder of the Loan Documents.

Borrower claims that "in excess of $400,000" has been wrongfully withheld. Borrower also contends that, if the funds had been released, it "could have paid those monies toward the debt obligation on the Promissory Note, so that the Note would not be in alleged default, thereby not causing any alleged default on the Mortgage." According to Borrower, then, Lender would have no right to foreclose the Mortgage, by advertisement or judicial process.

Lender notes that, upon an event of default of the Mortgage (which occurred in October 2009), "Lender may apply the Collateral to the payment of the Debt in any order in its sole discretion or for such other purposes as may be authorized under the Loan Documents." Lender argues that because Borrower defaulted seven months before the judgment was satisfied, Lender was within its rights to apply the funds "in any order in its sole discretion."

H. The Foreclosure

As required by the applicable statutes, on March 24, March 31, April 7, and April 14, 2010, Lender published notices that the Properties would be foreclosed by public auction on April 22, 2010. A notice of foreclosure was also posted on each of the Properties. Borrower makes no allegations of any defect in the notice procedure.

On April 12, 2010, Borrower's counsel notified Lender's counsel that it was challenging certain aspects of Lender's right to foreclose and requesting that Lender "cease and desist from all efforts attempting to sell or convey the properties, by

advertisement or otherwise." Borrower's challenges include:

1. The Assignment from Lehman Brothers to the Trust is invalid because:

    a. there is no assignee on the face of the document[5];

    b. the person who executed the Assignment for Lehman Brothers lacked present intent to convey the documents to the Trust because the ink stamp defining the assignee was likely affixed after the assignment was executed;[6]

    c. the assignor also lacked present intent to convey the documents because Exhibit A to the assignment identifies the original mortgage recording date as January 24, 2005, eighteen days after the assignment was executed (on January 6, 2005).

2. The Assignment from the Trust to Lender is invalid because:

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[5] The space for the Assignee contains an asterisk, and at the bottom of the page, below the statement [Remainder of Page Intentionally Left Blank], the asterisk is used to define the assignee as the Trust

[6] Borrower also alleges that whomever affixed the ink stamp defining the Trust as the assignee may have lacked authority to do so.

a. Borrower has no indication that the person executing this assignment had property authority to do so.

3. The Assignment to Lender references only an assignment of the Mortgage, not the Note. Borrower demanded evidence that the Note was also assigned, and physically transferred, to Lender.

Borrower also demanded evidence that the Cash Management Agreement was assigned to Lender, an accounting history regarding the loan, and a copy of the loan application.

On April 13, 2010, Lender responded by disputing Borrower's "validity" arguments. It also offered to make "the original Note, Mortgage, Assignment of Rents, and the necessary assignments" available at the office of Lender's counsel for "the limited purpose of confirming the documents contain the appropriate original signatures." Rather than take Lender up on its offer, Plaintiff filed the instant action.

Borrower now questions the validity of the First and Second Mortgage Assignments in this proceeding. As noted above, in addition to the challenges raised in Borrower's April 12, 2010 letter, Borrower claims that the failure to record interim assignments reflecting LBHI and SASC as assignees renders the record chain of title fatally defective. Borrower states that Lender has no right to foreclosure by advertisement, and such foreclosure should be enjoined.

III. ANALYSIS

A. Standard For Granting An Injunction

The Supreme Court has stated that "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def Council*, __ U.S. ___ , 129 S.Ct. 365, 376 (2008). *See also Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) ("A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it."); *Roghan v. Block*, 590 F. Supp. 150, 153 (W.D. Mich. 1984), *aff'd* 790 F.2d 540 (6th Cir. 1986) ("There is no power the exercise of which requires greater caution, deliberation, and sound discretion, or more dangers in a doubtful case, than the issuance of an injunction.") - (citation omitted). "[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Thus, Borrower here must affirmatively demonstrate its entitlement to injunctive relief.

A plaintiff seeking a preliminary injunction must establish (1) that he has a strong likelihood to succeed on the merits; (2) that he is likely to suffer irreparable harm without the injunction; (3) that the injunction would not cause substantial harm to others; and (4) that an injunction is in the public interest. *Winter*, 129 S.Ct. at 374; *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438,445 (6th Cir. 2003). Although the factors are to be balanced, a finding that there is no likelihood of irreparable harm, *Winter*, 129 S.Ct. at 375, or no

likelihood for success on the merits, *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000), is usually fatal.

B. Likelihood Of Success

To establish a likelihood of success, a plaintiff must, "at a minimum, show[ ] serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued." *Six Clinics Holding Corp., II v. Cafcomp Sys , Inc.*, 119 F.3d 393, 400 (6th Cir. 1997) (quotation and citation omitted).

In Michigan, the right to foreclosure by advertisement is statutory. Such foreclosures, however, "are a matter of contract, authorized by the mortgagor, and ought not be hampered by an unreasonably strict construction of the law." *Church & Church, Inc. v. A-1 Carpentry*, 766 N. W.2d 30, 36 (Mich. App. 2008).

Borrower has raised a claim for declaratory relief with regard to Lender's standing and authority to foreclose by advertisement under M.C.L. § 600.3 204. Essentially, Borrower asserts four "defects" to Lender's right to foreclose by advertisement: (1) Lender has not provided evidence that it physically possesses the Note; (2) technical defects in the First and Second Mortgage Assignments render them invalid; (3) because two alleged assignments of the Mortgage (to LBHI and SASC) are not recorded with the Register of Deeds, Lender cannot establish the requisite record chain of title; and (4) Lender allegedly breached the Cash Management Agreement by failing to release certain funds to Borrower, without which breach,

Borrower claims it would not be in default or subject to foreclosure. Borrower also asserts trespass to chattels and conversion claims based on the same alleged defects.

Because Borrower's trespass to chattels and conversion claims rely on similar analysis, I will begin with a review of Borrower's claim for declaratory relief.

1. Borrower Has Not Established A Likelihood Of Success On The Declaratory Action Claim

Michigan's foreclosure-by-advertisement statute permits a party to foreclose by advertisement if (in relevant part):

> (1) . . . (a) A default in the condition of the mortgage has occurred, by which the power to sell became operative;
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage; and
>
> (3) If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage.

9 M.C.L. § 600.3204(1) and (3).

a. Borrower Does Not Dispute That It Is In Default

Lender alleges that Borrower has failed to make payments on the Loan from October 11, 2009 to the present. Lender accelerated the maturity of the Note and demanded payment in full by Demand Letter dated January 14, 2010. According to Lender, the amount due and owing on the Loan as of April 15, 2010 was $18,112,138.80, representing the accelerated principal, interest, prepayment consideration, late charges, and fees.

Because Borrower has offered no evidence to dispute these facts, Lender has satisfied condition (1)(a).

b. Lender Offers Sufficient Proof That It Is The Owner Of The Indebtedness

Borrower argues that Lender cannot satisfy condition (1)(d) – that it owns the indebtedness or an interest in the indebtedness – because it has not provided proof that it is in physical possession of the original Note. Borrower cites *Davenport v. HSBC Bank USA*, 739 N.W.2d 383 (Mich. App. 2007), claiming that Lender's failure to provide such evidence "is a structural defect that goes to the very heart of defendant's ability to foreclose by advertisement." That case is distinguishable. In *Davenport*, the foreclosing bank published the notice of foreclosure *before* it was assigned any rights in the mortgage. The court explained that, where the defendant did not own an interest in the mortgage when it commenced foreclosure proceedings, those proceedings were void. In the instant case, the Second Mortgage Assignment

to Lender was recorded with the Register of Deeds on March 4, 2010, and the notice of foreclosure was first published on March 24, 2010. Thus, *Davenport* is inapposite to the issues in this case.

Nevertheless, I agree with Borrower's basic premise that before Lender can initiate foreclosure proceedings, it must establish that it owns the indebtedness.

Lender has offered testimony by affidavit of David H. Smith[7] that Lender is currently the holder of the Note, Mortgage, and all other Loan Documents, and the First Assignment Documents and Second Assignment Documents. Smith also stated that the Loan Documents, First Assignment Documents, and Second Assignment Documents are true and authentic copies of the original respective documents. Finally, Lender produced the original of each relevant document before the hearing on May 13, 2010. The Court has examined those documents and compared them to copies of the same that each party attached to its court filings.[8] In addition, the Court compared each recorded document with the corresponding copy that Plaintiff independently obtained from the county recorder. The Court's review demonstrates that Defendant is in possession of the authentic original

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[7] David H. Smith is a Senior Vice President for CWCapital Asset Management LLC ("CWCapital"). CWCapital is the Special Servicer for the Trustee of the Trust. The Trust is the sole member of Lender.

[8] Plaintiff has raised no authenticity-based objections to the previously-available copies, instead challenging only whether Defendant was in physical possession of the originals.

documents. The originals bear original signatures in a variety of inks, original recording stamps (and in some cases, original receipts from the recording), affixed stickers identifying the Trust as the assignee, raised notary seals, and all "imperfections" – such as cross-outs and stray marks – that were visible on the copies. The Court has no reason to question the authenticity of the documents and is satisfied that they appear authentic on their face. Accordingly, Defendant has established that it is the holder of the indebtedness.[9]

Arguing in the alternative, Borrower cites numerous cases for what it purports to be the "majority rule" that "if there is sufficient space on a note for endorsement, one does not become a holder in due course if the purported assignment or transfer is pursuant to an allonge."

As Borrower acknowledges, endorsement of a negotiable instrument is governed by M.C.L. § 440.3204. A 1993 amendment to that section added the sentence, "For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is part of the instrument." M.C.L. § 440.3204(1). The commentary to that section explains, "[a]n indorsement on an allonge is valid even

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[9] Borrower argued that, if Lender could not establish its physical possession of the Note, "the party that took *actual* assignment of the Note could still sue [Borrower] for the entire debt." (Motion at 8-10). Because Lender has established its possession, Borrower is no longer at risk of any action for double-recovery by a non-holder. M.C.L. § 440.3602 (providing that any payment to a 'person entitled to enforce the instrument' must be credited against the note).

though there is sufficient space on the instrument for an indorsement."

Thus, regardless of any purported majority rule, an Allonge affixed to a Note effectively negotiates the instrument without regard to space remaining on the original instrument.

Finally, Borrower argues that the allonges were ineffective because they were not "affixed" to the Note. Under Michigan law, an allonge "affixed" to a note becomes "part of the instrument." M.C.L. § 440.3204(1).[10] Borrower cites two non-binding state court decisions from other jurisdictions in support of its argument. The Court's independent research identifies no Michigan or Sixth Circuit authority establishing the method of attachment necessary to create an effective endorsement.

In this case, the allonges presented to the Court were attached to the Note; the First Allonge states that it "forms a part of that Promissory Note dated December 30, 2004 made by" Borrower to Lehman Brothers; and the Second Allonge states that it is "to be attached to, modify, and be a part of that certain

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[10] The previous version of this rule, then in M.C.L. § 440.3202, required an allonge to be "so firmly affixed [to the Note] as to become a part thereof." A 1993 amendment rewrote this section, which now requires only that the allonge be "affixed." The change in language suggests an intent to expand, rather than restrict, the use of allonges. *Cf. Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719, 728 (Tex. App. 1977) (finding the reverse change – from "attached" to "so firmly affixed . . . as to become a part thereof" – evidenced a clear intent to restrict, rather than expand, the use of allonges).

Promissory Note . . . dated effective December 30, 2004, made by [Borrower] payable to the order of [Lehman Brothers]." In these circumstances, given the clear intent that the Note and Allonges were to be physically attached, the evidence is insufficient to invalidate the endorsements. *See In re Nash*, 49 B.R. 254, 261 (Bankr. D. Ariz. 1985).

c. *Lender Has Established A Record Chain Of Title*

Borrower next argues that Lender cannot satisfy condition (3) because it "has not produced evidence of an unbroken chain of assignments of the Mortgage, beginning with Lehman Brothers and ending with [Lender]." Although Borrower's search of the Register of Deeds revealed assignments from Lehman Brothers to the Trust, and from the Trust to Lender, Borrower alleges that two interim assignments have not been recorded, precluding Lender from satisfying M.C.L. § 440.3204(3). Borrower also challenges the validity of the recorded assignments based on certain technical defects.

(1) The Unrecorded Assignments Do Not Prevent Lender From Foreclosing By Advertisement

Borrower asserts that two interim assignments exist, neither of which were recorded with the Register of Deeds. Citing *Arnold v. DMR Financial Services*, 532 N.W.2d 852, 855-56 and n. 7 (Mich. 1995), Borrower claims that the absence of these assignments in the county record prohibits foreclosure by advertisement. Notably, however, *Arnold* holds that a mortgagee's failure to record an assignment to a third

party as security did not render foreclosure by advertisement void:

> In *Feldman* [*v. Equitable Trust Co.*, 270 N.W. 809, 810-11 (Mich. 1937)], this Court held, and we hold again that [the foreclosure by advertisement statute] provided that only the record holder of the mortgage could foreclose by advertisement, and the mortgagor was not affected by the fact that others had an unrecorded interest in the mortgage . . . . **[T]he existence of equitable rights in the mortgage by persons other than the person who had legal title alone did not create a valid objection on behalf of the mortgagor if the mortgagor was unaffected by those interests.**

Id. at 676-78 (emphasis added).

Although Borrower argues that the holding of *Arnold* is limited to unrecorded assignments for security purposes only, the Michigan Supreme Court addressed unrecorded assignments for the purpose of establishing a trust in *Peterson v. Jacobs*, 6 N.W.2d 533 (Mich. 1942). In *Peterson*, an interim holder held an assignment of a loan for eight months before depositing it into a trust. The assignment to that interim entity was never recorded. The court stated that "**[i]t would have been perfectly useless and serve no good purpose to mention the assignment and reassignment unless such legal formalism is mandatory.**" *Id.* at 536. It then upheld the foreclosure sale, explaining that the statutory requirements need only substantial compliance. "Slight and inconsequential irregularities" – including

the failure to record the short-term interim assignment – did not invalidate the foreclosure by advertisement. *Id.*

In this case, the allegedly missing assignments were held by two entities for a combined total of one month (on or about January 6, 2005, to February 8, 2005), far less than the period at issue in *Peterson*. Borrower has not been affected by any failure to record assignments to those entities. Lender has established a record chain of title from the original mortgagor (Lehman Brothers) to Lender. The chain of title, which substantially complies with the foreclosure by advertisement statute, establishes Lender as the only entity with a right to foreclose by advertisement.

(2) Borrower Lacks Standing To Challenge Validity Of The Assignments

Borrower disputes the validity of the assignment documents on several grounds outlined above. But, as a non-party to those documents, it lacks standing to attack them.

Apart from the minimum constitutional requirements for standing, the Supreme Court recognizes other "prudential limitations" on the question of standing. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). Among these limitations, a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*

Lender argues that under principals of basic contract law, a non-party to a contract does not have the right to challenge the validity of the contract

unless it is a third-party beneficiary to that contract. Borrower counters, without authority, that although as a non-party it cannot *enforce* a contract, Borrower only seeks to "prevent a sale of property" through "examination of the validity of the assignments." (Pl. Reply, Dkt. 20 at 5). Effectively, Borrower seeks to *prevent enforcement* of the assignments – despite the fact that the parties have affirmed their validity.[11]

Borrower certainly has an interest in avoiding foreclosure. But the validity of the assignments does not effect *whether* Borrower owes its obligations, but only *to whom* Borrower is obligated. Although a debtor may assert certain defenses that render an assignment absolutely invalid (such as nonassignability of the right assigned), he generally may not assert any ground which may render the assignment voidable "because the only interest or right which an obligor of a claim has in the instrument of assignment is to insure him or herself that he or she will not have to pay the same claim twice."[12] 6A C.J.S. ASSIGNMENTS § 132. A debtor, for example, cannot raise alleged acts of fraud, or question the motive or purpose underlying an assignment. *Id.*

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[11] By way of affidavit, William Walenczyk, Senior Vice President of Aurora Bank FSB f/k/a Lehman Brothers expressly affirmed the validity of the transfer to the Trust. And David H. Smith, Senior Vice President of CWCapital, the Special Servicer for the Trust, affirmed the validity of the transfer from the Trust to Lender

[12] As noted above, because Lender has established that it holds the original Note, Borrower is not at risk of paying the same claim twice.

In *Pashak v. Interstate Highway Construction, Inc.*, No. 189886, 1998 WL 2001203 (Mich. App. Mar. 20, 1998), the Michigan Court of Appeals held that a lessee lacked standing to challenge the validity of the lessor's assignment of its interest in the lease:

> Although [lessee] challenges the validity of the assignment [of the lease] as between [the assignor] and [the assignees], we find that it lacks standing to do so where the parties to the assignment . . . do not contest its validity.

Id. at * 1 (citing *Woods v. Ayres*, 39 Mich. 345 (1878) (holding that where the parties to an assignment act in accordance with the assignment, and there is no evidence that either party to the assignment objects so as to create a hostile title, a third-party to the assignment cannot challenge its validity)).

And in *Bowles v. Oakman*, 225 N. W. 613 (Mich. 1929), the Michigan Supreme Court held that a maker of a note may not attack the validity of a transfer of that note:

> The fraud of [the assignee] did not render the transfer void. It was at most voidable at the instance of those defrauded. Plaintiff was the holder of the note, and had title to it at the time of trial . . . .
>
> [Debtor] had no defense of his own to the note. He [may not defend on the grounds that] an indorsee had been guilty of fraud upon the payee or the equitable owners. An adjudication upon such defense would not bind the persons defrauded, as they are not parties hereto, and it

> would be idle. This action is by the person having legal title to the note. A judgment herein is conclusive. It makes no difference to [the payor] who may have equitable title to the note, as he has no defense on the merits.

Id. at 614. The court also quoted *Gamel v. Hynds*, 125 P. 1115 (Okla. 1912), with approval:

> The assignor or indorser on negotiable instruments must protect his own interest, where he had been induced to assign or indorse through fraud; and **the maker cannot defend or set up matters of defense which only exist between the indorser and indorsee.**
>
> **The maker of a promissory note cannot, in an action brought against him by the indorsee or transferee thereof, litigate questions that can properly arise only between the holder and his immediate indorser.**

Id. (emphasis added).

Michigan's Commercial Code also recognizes that, except in limited circumstances not applicable here, an obligor of a negotiable instrument may not assert the defenses of another, including the assignor of the instrument. M.C.L. 440.3305(3) ("the obligor may not assert against the person entitled to enforce the instrument a defense ... of another person").

In fact, for over a century, state and federal courts around the country have applied similar reasoning to hold that a litigant who is not a party to an

assignment lacks standing to challenge that assignment. For example, in *Ifert v. Miller*, 138 B.R. 159 (Bankr. E.D. Pa. 1992), the court explained that an obligor lacks standing to challenge an assignment:

> [The underlying contract] is between [Obligor] and [Assignor]. [Assignor's] assignment contract is between [Assignor] and [Assignee]. The two contracts are completely separate from one another. As a result of the assignment contract, [Obligor's] rights and duties under the [underlying] contract remain the same: The only change is *to whom* those duties are owed . . . . [Obligor] was not a party to [the assignment], nor has an cognizable interest in it. Therefore, [Obligor] has no right to step into [Assignor's] shoes to raise [its] contract rights against [Assignee]. [Obligor] has no more right than a complete stranger to raise [Assignor's] rights under the assignment contract.

Id. at 166 n. 13 (applying Texas law). The same analysis applies here. The Loan Documents are between Borrower and Lehman Brothers. The assignments are between (some combination of) Lehman Brothers, LBHI, SASC, the Trust, and Lender. After the assignments, Borrower's rights and duties under the Loan Documents remain the same, the only change being *to whom* those duties are owed. Borrower cannot now step into the shoes of an assignor to assert its contract rights. *See also Liu v. T & H Mach., Inc.*, 191 F.3d 790 (7th Cir. 1999) (party to underlying contract lacks standing to "attack any problems with the reassignment" of that contract); *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90 (8th Cir. 1900)("As long as no creditor of the assignor

questions the validity of the assignment, a debtor of the assignor cannot do so."); *Byczek v. Boelter Cos.*, 230 F. Supp. 2d 843 (N.D. Ill. 2002) (same); *Nicolls Pointing Coulson, Ltd. v. Transp. Underwriters of La., Inc.*, 777 F. Supp. 493 (E.D. La. 1991) ("a debtor cannot challenge an assignment of a debt by a creditor unless he can show he is prejudiced by the assignment"); *The Prussia,* 100 F. 484 (D. Wash. 1900) (holding the validity of an assignment cannot be collaterally attacked on the ground of alleged technical irregularities by a non-party to the assignment, where no objection is made by the assigning entity); *In re Holden*, 2 N.E.2d 631 (N.Y. 1936) ("The assignments were valid upon their face. The assignee was the legal owner of the claims assigned. No one could question the validity of the assignments except the assignors."); *Pagosa Oil and Gas, L.L.C. v. Marrs and Smith P'ship*, No. 08-07-00090, __S.W.3d___, 2010 WL 450910 (Tex. App. Feb. 10, 2010) (finding lessor lacked standing to challenge assignment of lessee's breach of lease action because lessor was not party or third-party beneficiary to assignment contract); RICHARD A. LORD, 29 WILLISTON ON CONTRACTS § 74:50 (4th Ed.) ("**the debtor has no legal defense [based on invalidity of the assignment] . . . for it cannot be assumed that the assignee is desirous of avoiding the assignment.**") (emphasis added).

In light of these compelling authorities, I hold that Borrower may not challenge the validity of assignments to which it was not a party or third-party beneficiary, where it has not been prejudiced, and the parties to the assignments do not dispute (and in fact affirm) their validity.

(3) Even if Borrower Could Challenge The Assignments, It Is Not Likely To Succeed On The Merits

I offer a brief discussion of Borrower' s likelihood of success on the merits, should Borrower have been permitted to challenge the validity of the assignments. First, Lender submits that Borrower made over $5,000,000 in payments to the Trust without questioning whether it was paying to the appropriate entity. It was only *after* Borrower defaulted, and a foreclosure sale was imminent, that Borrower raised supposed irregularities in the Assignments. And as recently as December 22, 2009, Borrower expressly acknowledged that "the Loan Documents are in full force and effect and are binding on [Borrower] in accordance with their terms", "the Loan Documents continue to constitute [Borrower's] legal and enforceable obligations", and "[Borrower] . . . currently holds no claim against Holder." Therefore, even if Borrower was permitted to challenge the validity of the assignments, Lender would appear to have valid defenses of laches, estoppel, waiver, and/or ratification sufficient to rebut Borrower's challenges at this stage in the proceedings.

Next, Borrower argues that the Trust was not created at the time the Assignment to it was executed and thus the assignment should be declared void. Lender explains that the Pooling and Service Agreement, which established the Trust, is dated "as of January 11, 2005" – the effective date of the Assignment to the Trust. Even if the Trust was created later, as Borrower suggests, Lender would appear to have valid counter arguments that the assignments are valid under the *de-facto-corporation*

or corporation-by-estoppel doctrines, or that the parties to the Assignments ratified or adopted the contract(s) after the Trust was formed. *See, e.g., Duray Dev., LLC v. Perrin*, __N. W.2d___, 2010 WL 1461616 (Mich. App. 2010). Ratification or adoption, including by complete performance by the parties, also would appear to "cure" any alleged defects caused by persons executing the contracts without proper authority.[13]

Finally, to the extent Borrower argues that Lehman Brothers' failure to identify an assignee at the time it executed the assignment defeats the requisite "present intent" to make a transfer, the law permits assignment in blank, which authorizes the transferee/holder to fill in the blanks with terms consistent with the parties' intent *See, e.g., McCurdy v. Van Os*, 287 N.W. 890 (Mich. 1939) (holding assignment in blank sufficient to release assignor, where bank (purported assignee) took possession of assignment and related original documents and

---

[13] Without citing authority, Borrower claims that David H. Smith lacked authority to execute the Second Mortgage Assignment from the Trust to Lender. For this proposition, Borrower relies exclusively on the absence of Smith's name from CWCapital's Certificate of Organization Under Massachusetts Law, a recordable instrument affecting an interest in real property executed in the name of a limited liability company by any person identified on the Certificate of Organization "shall be binding on the limited liability company." M.G.L. 156C § 66. Although this conclusively establishes the authority of any person named on the Certificate to execute real-property instruments, it does not establish that a person *not named* on that Certificate lacks authority. This would seem to be especially true when the executed instrument does not affect *CWCapital's interest* in real property, but rather an interest of an entity for which CWCapital serves as Special Servicer, as in the instant matter.

exercised control over property consistent with having released assignor from obligations); *Mason Lumber Co. v. Collier*, 41 N. W. 913 (Mich. 1889) ("an assignment, like the one in question here, if filled in with the name of an assignee, after deliver[y] in blank, with the consent of the assignor, would become operative and valid in the party whose name was thus inserted."); M.C.L. § 440.3115 (an incomplete instrument may be completed according to its terms, as augmented with authority of the signer; **the burden of establishing that additions are without authority is on the person asserting the lack of authority**). That all parties to the assignments acted as though they were valid – including physically transferring the original documents to each successor assignee – would appear to defeat Borrower's intent-based arguments without the need to reconstruct history or conduct extensive discovery against non-parties to this action.

2. *Borrower Has Not Established A Likelihood Of Success On Its Remaining Claims*

a. Trespass To Chattels And Conversion

"A trespass to chattels is actionable if one dispossesses another of or intentionally and harmfully interferes with another's property." *Mackie v. Bollore S.A.*, No. 286461, 2010 WL 673295 (Mich. App. Feb. 25, 2010).

Conversion is generally defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600 (Mich. 1992).

In its Complaint, Borrower argues that Lender's allegedly wrongful efforts to foreclose form the basis for these claims by "interfer[ence] with " and "exertion of wrongful dominion over" Borrower's "Properties." Borrower has cited no authority to suggest that a foreclosure of real property, even if wrongful, can satisfy these personal-property-based claims. Nevertheless, because Borrower has not shown substantial likelihood of success on is declaratory judgment action based on the same allegations, it cannot show a likelihood of success on these claims.

b. Breach Of Contract

Borrower alleges that Lender breached the Cash Management Agreement by failing to release certain funds, in violation of Paragraph 12 of that agreement (describing certain termination events). Borrower claims it provided the proof required to terminate the agreement and release the funds on March 4, 2010, but Lender has refused to tender or otherwise account for the funds. Borrower further alleges that it "could have paid those monies toward the debt obligation . . . so that the Note would not be in alleged default, thereby not causing any alleged default on the Mortgage . . . [leaving Lender] no right to foreclose the Mortgage."

Lender notes that Paragraph 9 of the Cash Management Agreement permits the Lender to "apply the Collateral to the payment of the Debt in any order in its sole discretion" if an Event of Default occurs. Because Borrower defaulted on the loan in October 2009, and the debt was accelerated in January 2010, Lender argues that Borrower was the first to breach and cannot maintain an action against based on Lender's alleged subsequent breach or failure to

perform. *See Flamm v. Scherer*, 198 N.W.2d 702 (Mich. App. 1972).

Borrower does not dispute this, and appears to concede that by the time Lender allegedly breached the Cash Management Agreement, the debt had been accelerated due to Borrower's prior default. The balance due and owing as of January 14, 2010, was over $17,000,000. Even if Lender had released the funds, Borrower would have been unable to cure its default.

Accordingly, Borrower has not shown a likelihood of success on the merits on this claim.[14]

C. **Likelihood Of Irreparable Harm**

With respect to the this factor, the harm that would result in the absence of the injunction must be irreparable, not merely substantial. As the Supreme Court has noted,

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

---

[14] Even if Borrower could succeed on this breach of contract claim, it could not show irreparable harm because money damages would be a sufficient remedy. *See Basicomputer Corp, infra.*

Sampson v. Murray, 415 U.S. 61, 90 (1974) (citation omitted).

In evaluating the harm facing the plaintiffs, the court must evaluate three factors: "(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). In establishing the harm, a movant must provide record evidence, such as facts and affidavits, from which the court can make specific findings. *Id.* at 290-91. "[A] plaintiff's harm is not irreparable if it is fully compensable by money damages." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992).

Borrower submits, without supporting evidence or authority, that "the value of losing its real property (along with established tenants who have leases), the significant tax consequences to [Borrower] if there were a sale, and the loss of goodwill is hard to calculate and cannot be compensated alone with money damages." (Dkt. 15 at 19). Borrower also states without authority that:

> the power to redeem will not return [Borrower] to the status quo, because the tax consequences of the sale cannot be undone; nor can one say with any certainty that [Borrower] will be able to retain its tenants with the specter of a transfer of the property to the new owners looming; nor can one say that [Borrower] will be able to recover its goodwill with the black eye of foreclosure looming . . . . Moreover, the financing terms of the loan which allow payment over time at a desirably low interest

> rate (the Note does not mature until January 2015) will have been lost.

(*Id*. at 20).

Lender argues that Borrower "has been damaged by its own default in failing to make payments as required by the Loan Documents since October 2009, not by any loss caused by Lender's pending foreclosure." Moreover, Lender submits that Michigan's six-month statutory redemption period is an adequate remedy at law sufficient to deny injunctive relief. (Dkt. 16 at 7) (citing *Dumas v. Helm*, 166 N.W.2d 306, 309 (Mich. App. 1968) ("The rights of redemption provided for in foreclosure matters provide defendants with adequate relief")).

It appears that many of Borrower's alleged harms are self-inflicted or speculative – neither of which satisfy the irreparable harm requirement. *See* 11A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE CIV. § 2948.1 (2d ed.) ("Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted."; "Speculative injury is not sufficient."). With the debt having been accelerated due to Borrower's admitted default, Borrower already has lost its "desirably low interest rate." Similarly, the "black eye of foreclosure" is looming because of Borrower's default, not Lender's actions or any allegedly defective assignment. And Borrower has provided no evidence of a likelihood of loss of goodwill sufficient to justify an injunction.

Finally, because Borrower is permitted to redeem after the sale, it has not shown that irreparable harm will occur at the time of the foreclosure sale. *Sayo v.*

Zions First Nat'l Bank, No. 06-14963, 2006 WL 3392072 (E.D. Mich. Nov. 22, 2006) (rejecting loss-of-goodwill arguments, finding redemption period adequate remedy, and denying motion to enjoin foreclosure); *see also Dumas*, *supra*.

D. Harm To Others And Public Interest

Lender alleges that the present delay in the foreclosure harms it in the amount of $3,595 in lost interest each day, plus legal expenses and attorneys' fees.

In terms of public policy, as Judge Hood explained in *Sayo*, *supra*:

> there are public policy arguments in favor of both sides of the dispute. Public policy disfavors the sale of real property through foreclosure auctions, but also favors parties to honor contractual agreements, such as the Mortgage Agreement in this case.

E. Balancing The Factors

The critical first and second factors weigh in favor of Lender. Borrower cannot demonstrate that it will succeed on the merits or suffer irreparable harm caused by the failure to issue an injunction. As to the third factor, Borrower has not shown that its harms decidedly outweigh Lender's harms. And, because Borrower contractually agreed to the foreclosure-by-advertisement remedy, public policy does not favor permitting Borrower to escape its contractual obligations, especially where it cannot satisfy the other factors.

The court will not issue a preliminary injunction to prevent Lender from foreclosing by advertisement.

IV. CONCLUSION

Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Dkt. 1, Attachment #3) is DENIED with prejudice; and

Wayne County Circuit Court's April 15, 2010 Temporary Restraining Order, extended by Order Extending Effect of Temporary Restraining Order (Dkt. 14) is DISSOLVED.

IT IS SO ORDERED.

Date: May 13, 2010

s/ John Feikens
John Feikens
United States District Judge

[*Proof of Service omitted in printing this appendix*]

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Case No: 2:10-CV-11589-JF-VMM
Honorable John Feikens
Magistrate Virginia M. Morgan

[Filed April 22, 2010]

LIVONIA PROPERTIES HOLDINGS, L.L.C., a Michigan limited liability company	)
Plaintiff,	)
vs.	)
12840-12976 FARMINGTON ROAD HOLDINGS, L.L.C., a Maryland limited liability company	)
Defendants	)

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ORDER EXTENDING EFFECT OF TEMPORARY RESTRAINING ORDER, SETTING HEARING DATE, AND SETTING DEADLINE FOR DEFENDANT'S RESPONSIVE PLEADINGS

This matter came before the Court on Plaintiff's Motion to Extend the Effect of the state Court's April 15, 2010 Temporary Restraining Order until this Court holds Hearing on Whether the Temporary Restraining Order Should be Made into a Preliminary Injunction. Based upon the Court's review of Plaintiff's Motion and being advised in the premises,

IT IS ORDERED THAT the Wayne County Circuit Court's April 15, 2010 Temporary Restraining Order entered in this matter is extended to May 14, 2010.

IT IS FURTHER ORDERED THAT the parties shall appear for a hearing in this matter on May 13, 2010 at 10:00 a.m.

IT IS FURTHER ORDERED THAT the parties shall submit any responses and briefs on or before April 29, 2010.

s/John Feikens
John Feikens
United States District Judge

Dated: April 22, 2010

[*Certificate of Service omitted in printing this appendix*]

APPENDIX E

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT

10-004441-NZ

[Filed April 15, 2010]

Livonia Properties Holdings, L.L.C.,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
12840-12976 Farmington Road Holdings, L.L.C.,	)
	)
	)
Defendant.	)
	)

TEMPORARY RESTRAINING ORDER PURSUANT TO MCR 3.310(B)(1)

AND

ORDER TO SHOW CAUSE WHY THIS ORDER SHOULD NOT RESULT IN A PRELIMINARY INJUNCTION

At a session of said Court held in the City of Detroit, Wayne County,

Michigan on: APR 15 2010

Present: HONORABLE JOHN H. GILLIS, JR.
Circuit Judge

Plaintiff Livonia Properties Holdings, L.L.C. ("Livonia Properties") has filed a Verified Complaint and a Motion for Temporary Restraining Order and Preliminary Injunction (the "Motion"). The Court has considered the Verified Complaint and the Motion and has made a permanent record of any nonwritten evidence, arguments, and representations. The Court is otherwise advised in the premises.

NOW THEREFORE, IT IS ORDERED that the Motion is **GRANTED.**

IT IS FURTHER ORDERED that, pursuant to MCR 3.310(B), Defendant 12840-12976 Farmington Road Holdings, L.L.C. ("Farmington Road Holdings"), its agents, assigns, officers, attorneys, representatives, employees, and anyone working for it, through it, in contract with it, or in concert with it **IS RESTRAINED** from selling, attempting to sell, instructing others to sell the properties set forth in a certain Mortgage between Lehman Brothers Bank, FSB and Livonia Properties, which Mortgage is attached to the Motion as Exhibit 1, including:

A Parcel A: 27475-27603 Schoolcraft (Tax ID No. 46-097-99-0015-002);

B. Parcel B: 12840-12898 Farmington Road (Tax ID No. 46-106-02-0001-000);

C. Parcel D: 32421-32483 Schoolcraft (Tax ID No. 46-106-01-0030-001);

D. Parcel F: 31175-31209 Schoolcraft (Tax ID 46-102-99-0063-000),

as well as any properties listed in the Foreclosure Notice attached as Exhibit 5 to the Motion (all, collectively, the "Properties").

IT IS FURTHER ORDERED that, pursuant to MCR 3.305(C) and MCR 3.310(B), Farmington Road Holdings, its owners, members, shareholders, agents, assigns, officers, attorneys, representatives, employees, and anyone working for it, through it, in contract with it, or in concert with it is ordered to take all necessary steps to remove any Foreclosure Notices published or posted, and to advise the appropriate authorities conducting the auction that the Foreclosure Sale shall not proceed unless and until further order of this Court.

IT IS FURTHER ORDERED that no sale or auction of the Properties shall occur until further order of the Court.

In entering this Order, it appears to the Court as follows:

i. that pursuant to the arguments set forth in the Verified Complaint and the Motion, Farmington Road Holdings does not have the authority to assert rights of a mortgagee under the Mortgage;

ii. that pursuant to the arguments set forth in the Verified Complaint and the Motion, Farmington Road Holdings does not own, have possession of, or have the right to enforce the Promissory Note, attached as Exhibit 2 to the Motion, or other indebtedness purportedly secured by the Mortgage;

iii. that pursuant to the arguments set forth in the Verified Complaint and the Motion, Farmington Road Holdings does not have the right to foreclose the Mortgage by advertisement under MCL § 600.3204;

iv. that pursuant to an April 12, 2010 letter of Andrew W. Mychalowych (attorney for Livonia Properties) to Eric C. Bartley (attorney for Farmington Road Holdings), attached as Exhibit 6 to the Motion, Livonia Properties has demanded that Farmington Road Properties adjourn the Foreclosure Sale unless and until such time as Farmington Road Holdings provide proof of, among other things, possession and ownership of the Promissory Note and a chain of ownership of the Mortgage, beginning with Lehman Brothers Bank, FSB and ending with Farmington Road Holdings;

v. that Farmington Road Holdings has not yet provided such proof;

vi. that Livonia Properties has attached a Cash Management Agreement to the Motion, Exhibit 9, and sufficient proof that Livonia

Properties has the right to terminate the Cash Management Agreement, Exhibit 10, which, upon termination, "all funds remaining in the Property Account and the Lender Collateral Account shall be released to Borrower [Livonia Properties]." It appears that substantial sums in said accounts have not been released to Livonia Properties, monies which Livonia Properties contends could be used to pay the Promissory Note and would have avoided alleged default on the same.

vii. that a foreclosure of the Properties is scheduled to occur on April 22, 2010, at 1:00 p.m. at the Wayne County Circuit Court, and that, in accordance with the facts set forth in the Verified Complaint and the facts and arguments set forth in the Motion and the Exhibits attached thereto, the sale of the Properties would exact irreparable harm to Livonia Properties if the Court did not retrain Farmington Road Holdings in the manner set forth herein;

viii. that, in accordance with the facts set forth in the Verified Complaint and the facts and arguments set forth in the Motion and the Exhibits attached thereto, Livonia Properties is likely to succeed on its declaratory action and its trespass to chattels and conversion claims, and its breach of contract claims;

ix. that, in accordance with the facts set forth in the Verified Complaint and the facts and

arguments set forth in the Motion and the Exhibits attached thereto, the balance of the harms in issuing this restraining order favors the Livonia Properties because Livonia Properties will suffer substantially more harm if the restraining order is not issued than Farmington Road Holdings would suffer if the retraining order were issued;

x. that, in accordance with the facts set forth in the Verified Complaint and the facts and arguments set forth in the Motion and the Exhibits attached thereto, the public interest will be served by entering this restraining order because the Court is restraining the sale of the Properties where it appears the purported mortgagee, Farmington Road Holdings, does not have a right to sell such Properties.

IT IS FURTHER ORDERED that, pursuant to MCR 3.310(B)(2)(c), the Court orders that a hearing on Livonia Properties' Motion shall take place on April 21, 2010 in order to determine whether this restraining order should result in a preliminary injunction.

IT IS FURTHER ORDERED that the Court shall not require security to be posted because there does not appear to be any appreciable harm to Farmington Road Holdings even if this Court were to ultimately dissolve this Restraining Order.

IT IS FURTHER ORDERED that this Order shall expire on 4-22-10.

Dated APR 15 2010, 2010
Detroit, Michigan

JOHN H. GILLIS, JR.
Honorable
Circuit Court Judge

No. 10-970

In The
Supreme Court of the United States

LIVONIA PROPERTIES HOLDINGS, L.L.C.,

Petitioner,

v.

12840-12976 FARMINGTON ROAD HOLDINGS, L.L.C.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals properly affirm the district court's exercise of discretion in denying Petitioner's request to enjoin a foreclosure sale under the Michigan statute allowing foreclosure by advertisement, Mich. Comp. L. ("M.C.L.") § 600.3204, where the district court determined that (1) Petitioner had not established the requisite likelihood of success on the merits; (2) Petitioner had failed to demonstrate irreparable harm; its alleged injury was "self-inflicted or speculative" since Petitioner had failed to make its mortgage payments and had a statutory right to redeem the property for six months after the foreclosure sale; (3) the harm to Respondent ($107,850 per month in lost interest) outweighed any potential harm to Petitioner; and (4) public policy "does not favor permitting [Petitioner] to escape its contractual obligations, especially where it cannot satisfy the other factors" for a preliminary injunction? Pet. App. 50a.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent 12840-12976 Farmington Road Holdings, L.L.C., states the following:

12840-12976 Farmington Road Holdings, L.L.C., a Maryland limited liability company, is a wholly owned subsidiary of Bank of America, N.A. as successor to LaSalle Bank National Association, as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C1, Commercial Mortgage Pass-Through Certificates, Series 2005-C1, a REMIC trust. No publicly owned company owns 10% or more of the membership interest of 12840-12976 Farmington Road Holdings, L.L.C.

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INTRODUCTION

The Petition should be denied for at least three reasons. First, Petitioner has failed to identify any question worthy of this Court's attention. Petitioner's complaint in this diversity case asserts claims under the Michigan statute governing mortgage foreclosure by advertisement. The Eastern District of Michigan denied Petitioner's motion for preliminary injunction in the exercise of its discretion under Fed. R. Civ. P. 65, Pet. App. 19a, and the Sixth Circuit affirmed that exercise of discretion in its unpublished opinion. Pet. App. 1a. Both decisions rest on the conclusion that Petitioner failed to establish the requisite strong likelihood of success on its Michigan state law claims. Petitioner identifies no constitutional issue, no substantive question of federal law, no split among the circuits, and no conflict with any decision of this Court. Moreover, the law of Michigan is unique and the decisions under review have no impact in any other state.

Second, the decisions of the Sixth Circuit and the Eastern District of Michigan were correct. Michigan's foreclosure statute merely requires the foreclosing lender to establish a "record chain of title" before commencing a foreclosure by advertisement. M.C.L. § 600.3204(3). The district court and the Sixth Circuit both correctly held that (a) under settled Michigan law, interim transfers of the note and mortgage "in blank" before transfer to the Trust (and completion of the assignments "in blank" by filling in the name of the Trust) were proper and immaterial to

the "record chain of title"; (b) compliance with the Michigan statute is established by an examination of the records of the Register of Deeds; and (c) Petitioner lacked standing to contest these interim assignments of the note and mortgage "in blank." The Michigan law the courts below applied is clear and well settled. The district court properly distinguished the Massachusetts decision on which Petitioner relies. The Sixth Circuit motion panel correctly ruled that "an applicant for a stay or injunctive relief 'is always required to demonstrate more than the mere "possibility" of success on the merits.' . . . Upon review and consideration, we cannot conclude that [Petitioner] has done so." Pet. App. 17a-18a (citation omitted). The Sixth Circuit merits panel properly concluded that Petitioner's contentions were "disingenuous," and that "[t]he district court correctly rejected all of [Petitioner's] claims regarding 'record chain of title,' and properly concluded that [Petitioner] had little likelihood of success on the merits." Pet. App. 12a-13a.

Finally, the record amply demonstrates that Petitioner is both unwilling and unable to present the facts and the law properly, fully and fairly, and in compliance with the Rules of this Court. This, alone, is grounds to deny the Petition.

STATEMENT OF THE CASE

On December 30, 2004, Petitioner entered into a $16,300,000 Commercial Loan (the "Loan") from

Lehman Brothers Bank FSB that was secured by a mortgage on four large industrial properties in Livonia, Michigan. Petitioner leases these properties to numerous tenants. *See* C.A. E.R. 16-4, ¶ 6, C.A. E.R. 16-5 through 16-9.

Only one week later (January 6, 2005), but effective as of January 11, 2005, Lehman Brothers Bank FSB assigned the Loan to LaSalle Bank National Association, as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C1, Commercial Mortgage Pass-Through Certificates, Series 2005-C1 (the "Trust"),[1] which purchased the Loan for value. *See* C.A. E.R. 16-4, ¶ 7. Title searches filed with the district court by both Petitioner and Respondent disclosed that (1) the Mortgage was recorded with the Wayne County, Michigan, Register of Deeds (the "Register") on January 24, 2005; and (2) the Assignment of the Mortgage to the Trust was recorded with the Register on November 17, 2005. *See* C.A. E.R. 16-11, p. 2 of 7. After this assignment, over nearly four years, Petitioner made over $5 million in mortgage payments to the Trust without ever questioning the Trust's title to the mortgage at issue. *See* Pet. App. 20a.

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[1] Petitioner understood that the Loan would be sold on the secondary market and securitized at the time of origination and so agreed in Paragraph 16.1 of the Mortgage *See* C.A. E R. 16-7, p. 14 of 23 The "Trust" is a REMIC trust which is a Real Estate Mortgage Investment Conduit qualifying for "pass-through" tax treatment under the Internal Revenue Code, 26 U S C §§ 860A to 860G, and associated regulations.

Petitioner defaulted on the Loan in October 2009. On December 22, 2009 – over two months after Petitioner defaulted – Petitioner entered into a Prenegotiation Agreement with the Trust through its Special Servicer, CWCapital Asset Management LLC, so the parties could begin discussions on alternative resolutions to Petitioner's defaults. *See* Resp. App. 25a. In the Prenegotiation Agreement, Petitioner and its principal, David M. Clapper, acknowledged that the Trust was the holder of the Note and other Loan Documents. *See id.*, p. 1. Petitioner also "acknowledge[d] and agree[d] that it currently [held] no claim against [the Trust], including, but not limited to, set-off, recoupment, estoppel, waiver, cancellation of instruments, rescission, novation or excuse of performance under the Loan Documents by virtue of any action(s) or inaction(s) of Holder or any of its predecessors-in-interest, if any." The Prenegotiation Agreement specifically identifies Andrew Mychalowych, counsel for the Petitioner, as one of the Petitioner's representatives. Resp. App. 29a, 38a-39a.

In preparation for foreclosure, the Trust, through its Special Servicer, formed Respondent (12840-12976 Farmington Road Holdings, L.L.C.) and assigned the Loan and Loan Documents to Respondent. *See* C.A. E.R. 16-4, ¶ 9. The Assignment of Mortgage from the Trust to Respondent was dated March 3, 2010 and recorded on March 4, 2010. *See* C.A. E.R. 16-14 through 16-18. This was well before Respondent published the first notice of foreclosure on March 24, 2010. *See* C.A. E.R. 16-21.

Petitioner omits significant facts and procedural history that bears on the issues before the Court if certiorari were granted. First, Petitioner fails to mention that its own title search attached to its original brief in the district court confirmed the record chain of title. Pet. App. 6a-7a.

Second, Petitioner fails to mention or even attach the district court's 17-page opinion and order denying Petitioner's motion for reconsideration. (*See* Resp. App. 1a, *infra*). This omission violates this Court's Rule 14(i)(i) and (iii). In that opinion, the district court found:

> Here, the [Petitioner] acknowledges that a *record chain of title* exists evidencing transfers from the original mortgage holder (Lehman Brothers) to the Trust, and from the Trust to [Petitioner]. There are no unaccounted for or broken "links" in this chain.

Resp. App. 9a (emphasis in original). The district court also concluded that Petitioner's arguments regarding the Massachusetts opinion were "disingenuous at best." Resp. App. 22a, n. 18.

Third, Petitioner neglects to mention that the district court examined in chambers the original note and allonges (assignments of the note), mortgage and mortgage assignments before denying Petitioner's motion for preliminary injunction and dissolving the

temporary restraining order. *See* Pet. App. 21a-24a; 32a-33a.[2]

Fourth, Petitioner fails to mention the Prenegotiation Agreement in which it waived any claims. The Prenegotiation Agreement was a significant basis for the district court's holding that Petitioner had failed to establish the requisite likelihood of success on the merits. *See* Pet. App. 43a. Indeed, the Court of Appeals deemed Petitioner's claims "disingenuous" in light of the Prenegotiation Agreement. *See* Pet. App. 12a.

Finally, Petitioner fails to mention that under M.C.L. § 600.3240(7), it had the right to redeem the property for six months after the foreclosure sale, which occurred on June 16, 2010. *See* C.A. Doc. 006110654965, p. 3. The district court acted on Petitioner's motion for preliminary injunction and its motion for rehearing before the sale date. Pet. App. 19a, Resp. App. 1a. The Sixth Circuit acted on Petitioner's request for injunction pending appeal before the sale date, Pet. App. 16a, then issued its opinion on the merits within the six-month redemption period. Pet. App. 1a. Michigan's foreclosure statute allows

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[2] Respondent's counsel made a number of offers to allow Petitioner's counsel to inspect the original note. Petitioner's counsel rebuffed these offers, requiring the district court to review the original documents: "The Court: You [Petitioner's counsel] wouldn't be in this pickle had you gone over to the [Respondent's counsel] office and looked at these documents. You made me look at them for you." Tr. May 13, 2010, C.A. E.R. 27, p. 7.

redemption during this period for the *amount bid* at the foreclosure sale (plus interest), and not the amount of the entire mortgage debt as is customary in most other states that permit redemption. M.C.L. § 600.3240(2). Petitioner's assertion that it was a "victim[ ] of this Wild West," Pet. 26, is belied by the fact that Petitioner had the right to redeem from the foreclosure sale for the bid amount of $5,900,000 (plus interest)[3] even after the Court of Appeals confirmed that "[Respondent] appears to be in full compliance with the [Michigan foreclosure] statute." Pet. App. 8a.

REASONS FOR DENYING THE WRIT

I. The case involves a unique issue of Michigan law that does not merit this Court's review.

The district court denied Petitioner's requested preliminary injunction on the grounds that Petitioner had not established any of the four elements necessary to obtain injunctive relief under Fed. R. Civ. P. 65, and the Sixth Circuit affirmed. Both courts correctly

[3] This was the bid amount for the foreclosure sale conducted June 16, 2010 for three of the four properties. The foreclosure sale for the fourth property was delayed due to an environmental issue which was later resolved. The sale for the fourth property occurred February 10, 2011 with a bid amount of $3,500,000. Respondent is now left with a deficiency (loss) of well over $7,000,000.

applied the standard established by this Court in *Winter v. Natural Resources Def. Council*, 555 U.S. 7, 129 S.Ct. 365, 376 (2008), and the Sixth Circuit in *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003). *See* Pet. App. 28a. Petitioner does not contend that the Sixth Circuit or the district court failed to apply the correct federal standard for injunctive relief. Instead, Petitioner focuses on a single issue: probability of success on the merits. This is a pure issue of Michigan law that impacts foreclosures in Michigan and no other state, and does not merit review by this Court.[4] Another Northwest Territory state, Minnesota, is the only other state with a foreclosure by advertisement process similar to Michigan, but the specific statutory provision on "record chain of title" is not found in the Minnesota foreclosure statute. *See* Minn. Stat. § 580.02.

This Court grants petitions "for compelling reasons," which typically concern an "important question of federal law." Supreme Court Rule 10. The Court "do[es] not normally grant petitions for certiorari solely to review . . . an application of state law. . . ." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996). Moreover, when "dealing with issues of state law that enter into

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[4] The historical basis for Michigan's foreclosure statute can be traced to 1846. *See* Chap. 130, Mich. R. S. 1846. Earlier statutes from the Northwest Territory, the Mortgage Act of 1827 (2 Terr. Laws 431) and the Mortgage Act of 1833 (3 Terr. Laws 1065), authorized foreclosure by advertisement, but these statutes differed substantially from the 1846 Act

judgments of federal courts, [the Court is] hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper v. Clark*, 337 U.S. 472, 486-87 (1949). The Petition raises no federal question and requires interpretation of just one unique section of the Michigan foreclosure statute, M.C.L. 600.3204(3). It does not merit review by this Court.

II. The Sixth Circuit decision is correct.

A. Petitioner waived its claims in the Prenegotiation Agreement.

The Petition fails to discuss the Prenegotiation Agreement, which waives Petitioner's claims and forms an independent basis for the holding that Petitioner had failed to establish the requisite likelihood of success on the merits. *See* Pet. App. 12a, 43a.

Respondent is a limited liability company wholly owned by a REMIC Trust. The Trust formed Respondent shortly before the foreclosure in order to take title of the foreclosed property in the name of Respondent as a single purpose entity rather than taking title in the Trust. Defaulted loans in REMIC trusts are serviced by the "special servicer" under the applicable trust document, the "Pooling and Servicing Agreement."[5] The Special Servicer here was CWCapital

[5] *See* Talcott J. Franklin & Thomas F Nealon, Mortgage and Asset Backed Securities Litigation Handbook, § 1.8 (Thomson West 2010).

Asset Management LLC. Special servicers enter into "prenegotiation agreements" with borrowers on defaulted commercial mortgage loans so the parties may freely enter into negotiations regarding a possible restructure of the loan rather than resorting to foreclosure.[6]

Here, Petitioner entered into the Prenegotiation Agreement with the Trust for the benefit of the Trust, and its successors and assigns. *See* Resp. App. 25a. The Sixth Circuit found Petitioner's claims to be "disingenuous" in light of the waivers in this Agreement:

> Any claim by [Petitioner] that [Respondent] or the Trust before it was not a valid assignee of the mortgage rings hollow, as [Petitioner] made mortgage payments directly to the Trust for years, without questioning the Trust's right to receive payment. Further, when [Petitioner] first encountered difficulties in repayment, it entered into a prenegotiation agreement with the Trust. Standing alone, the existence of that agreement makes [Petitioner's] current questioning of the mortgage's ownership or assignments appear disingenuous, but the agreement's specific terms further weaken the claim. In the agreement, [Petitioner] expressly acknowledged that "[t]he Loan Documents are in full force and effect and are binding on the Borrower in accordance with their terms."

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[6] *See* 1 Stuart M Saft, Commercial Real Estate Workouts, § 3.24 (Thomson West 3d ed 2009).

Pet. App. 12a. The district court similarly held:

> [Respondent] submits that [Petitioner] made over $5,000,000 in payments to the Trust without questioning whether it was paying to the appropriate entity. It was only *after* [Petitioner] defaulted, and a foreclosure sale was imminent, that [Petitioner] raised supposed irregularities in the Assignments. And as recently as December 22, 2009, [Petitioner] expressly acknowledged that "the Loan Documents are in full force and effect and are binding on [Petitioner] in accordance with their terms", "the Loan Documents continue to constitute [Petitioner's] legal and enforceable obligations", and "[Petitioner] . . . currently holds no claim against Holder." Therefore, even if [Petitioner] was permitted to challenge the validity of the assignments, [Respondent] would appear to have valid defenses of laches, estoppel, waiver, and/or ratification sufficient to rebut [Petitioner's] challenges at this stage in the proceedings.

Pet. App. 43a (emphasis in original). Petitioner does not challenge these holdings, which make the present case a poor vehicle for the issue Petitioner seeks to present.

B. Michigan law is well settled that intermediate mortgage assignments need not be recorded.

Petitioner contends that the phrase "record chain of title" in M.C.L. § 600.3204(3) requires every link

in the chain to be recorded before foreclosure by advertisement.[7] In reality, as the district court and the Sixth Circuit held, Michigan law is clear that intermediate assignments need not be recorded, and assignments "in blank" as occurred here do not defeat the right to foreclose by advertisement.

The Michigan Supreme Court has consistently held that intermediate assignments need not be recorded. In *Feldman v. Equitable Trust Co.*, 278 Mich. 619, 270 N.W. 809, 810-11 (1937), the court held that the foreclosure by advertisement statute provided that the existence of unrecorded equitable rights in the mortgage did not defeat the right to foreclose by advertisement. In *Peterson v. Jacobs*, 303 Mich. 329, 6 N.W.2d 533 (1942), an interim holder held an assignment of a loan for eight months before depositing it into a trust, and the assignment to the interim entity was never recorded. The court upheld the foreclosure sale, holding the failure to record the interim assignment did not invalidate the sale. Most recently, in *Arnold v. DMR Financial Services*, 448 Mich. 671, 532 N.W.2d 852 (1995), the court reaffirmed its holding in *Feldman* and held the statute required only

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[7] Petitioner's argument is far from clear: The Petition interchanges "chain of title" (Pet. i, 9, 22) with "record chain of title" (Pet. ii, 12, 22), "contract chain" (Pet. 10), "chain of ownership" (Pet 13), and "'record chain'" (Pet. 15). As the Sixth Circuit noted, Petitioner "offers no definition of the term 'record chain of title,' and interchanges the phrase with 'chain of title' throughout its brief." Pet. App 6a.

that the interest of the mortgagee seeking to foreclose be recorded:

> In *Feldman*, this Court held . . . that only the record holder of the mortgage could foreclose by advertisement, and the mortgagor was not affected by the fact that others had an unrecorded interest in the mortgage. This Court determined that a foreclosure by the record mortgagee was proper, and the presence of an unrecorded security assignment was irrelevant. It noted that the existence of equitable rights in the mortgage by persons other the person who had legal title alone did not create a valid objection on behalf of the mortgagor if the mortgagor was unaffected by those interests.
>
> We reach the same conclusion in the instant case. Only the record holder of the mortgage has the power to foreclose; the validity of the foreclosure is not affected by any unrecorded assignment of interest held for security.

448 Mich. at 676-78 (footnotes omitted). The Michigan Supreme Court reversed the February 1994 decision of the Michigan Court of Appeals, which had required "any assignment" of a mortgage to be recorded. *See* 448 Mich. at 675.

The Michigan Supreme Court in *Arnold* construed the pre-1994 version of M.C.L. § 600.3204, which required that the mortgage and "all assignments" have been recorded. While the appeal in *Arnold* was pending, the Michigan Legislature, based

upon input from the Financial Institution Bureau and the Michigan Land Title Association, amended the statute to require only a "record chain of title."[8] The legislative history reflects that the purpose of this amendment was to overrule the erroneous Court of Appeals decision:

> The bill would provide a speedy resolution to problems raised by recent court decisions. Of particular concern is a court of appeals decision [in *Arnold*] that all mortgage assignments must be recorded with the register of deeds in order for a foreclosure to go forward. . . . By eliminating an overbroad requirement for all assignments to be recorded, . . . the bill would better reflect the real world of mortgage finance.

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[8] Michigan House Bill 5721 was amended to conform to the Senate Bill, and the legislature adopted it as 1994 Public Acts of Michigan, Act 397. The 1994 version of M.C.L § 600 3204(1)(c) stated

> (1) A party may foreclose by advertisement if all of the following circumstances exist:
>
> > (c) The mortgage containing the power of sale has been properly recorded and, if the party foreclosing is not the original mortgagee, a record chain of title exists evidencing the assignment of the mortgage to the party foreclosing the mortgage.

In 2004, the legislature rewrote the section, carrying over the phrase "record chain of title" to the current M.C L. § 600.3204(3).

Resp. App. 45a-46a, Michigan House Legislative Analysis Section, Analysis of House Bill 5721 (Sept. 20, 1994).

The Michigan Supreme Court in *Arnold* quoted the 1994 statutory amendment in support of its decision to overrule the Court of Appeals decision. *See* 448 Mich. at 677 n. 7. Thus, Petitioner's contention that the Michigan Supreme Court in *Arnold* held that "'all assignments [must be recorded]'", Pet. 21, misrepresents the holding in *Arnold* and attempts to mislead this Court.

In support of its contention that all assignments must be recorded, Petitioner also relies upon Michigan Attorney General Opinion No. 7147 and claims it was an abuse of discretion that neither the district court nor the Sixth Circuit addressed that opinion. Pet. 18. Petitioner fails to advise the Court, however, that the Editor's Note to that opinion states that "OAG No. 7147 has been superseded by subsequent legislative action." Resp. App. 61a. The legislation referenced in the note is the July 1, 2004 amendment to M.C.L. § 600.3204.

As the Sixth Circuit correctly observed, the purpose of the Michigan "chain of title" requirement is to avoid the risk that a borrower may be required to pay the debt twice. *See* Pet. App. 10a. There is no risk that Petitioner could be required to pay the debt twice because, on the facts of this case, Petitioner had no "genuine claim that [Respondent] is not the rightful owner of the loan." *Id.* This conclusion is correct

and dispositive and there is no need for review by this Court.

C. Petitioner lacks standing to challenge the intermediate assignments.

The Sixth Circuit also correctly concluded that Petitioner could not go outside the record chain of title, and lacked standing to challenge the assignments of the note and mortgage given the fact that Respondent had possession of the original note, original allonges, original mortgage, and original assignments of mortgage:

> [Petitioner] is correct that a party subject to foreclosure has standing to challenge whether a lender holds record chain of title, but that determination is limited to an examination of the public records. In its opinion on [Petitioner's] motion to reconsider, the district court clarified this difference, pointing out that [Petitioner] "acknowledges that a *record chain of title* exists," but is "unsatisfied with the *record chain of title*." . . . Because [Petitioner] finds no claim in the public records, it is seeking to "go beyond the statutory requirements to inspect each and every aspect of every contract or agreement" in the history of the loan.

Pet. App. 11a (emphasis in original).

The conclusion that Petitioner lacks standing to challenge the validity of unrecorded interim assignments is a cornerstone of both the Sixth Circuit and

district court opinions. *See* Pet. App. 9a-11a and 37a-42a. As the district court noted, for over a century, state and federal courts around the country have applied similar reasoning to hold that a litigant who is not a party to an assignment lacks standing to challenge that assignment. Pet. App. 40a-42a (*citing Liu v. T & H Mach., Inc.*, 191 F.3d 790 (7th Cir. 1999) (party to underlying contract lacks standing to attack any problems with the reassignment of that contract); *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90, 91 (8th Cir. 1900) ("As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so."), and six federal district court and state court cases). Petitioner does not contend that there is a disagreement among the Courts of Appeals on whether it has standing to challenge unrecorded assignments. Indeed, true to form, Petitioner does not even address the standing issue even though both the lower courts spent significant portions of their opinions explaining why Petitioner lacked standing. This unchallenged holding makes the present case a poor vehicle for review.

D. The Massachusetts decision in *Ibanez* is irrelevant.

Petitioner cites the Massachusetts Land Court decision in *U.S. Bank N.A. v. Ibanez*, 2009 WL 3297551 (Mass. Land Ct. Oct. 14, 2009), *aff'd*, 458 Mass. 637, ___ N.E.2d __, 2011 WL 38071 (Jan. 7,

2011). Pet. 17.[9] *Ibanez* differs legally and factually from the case under review. The district court discussed *Ibanez* at great length in the opinion which Petitioner omitted from its Appendix. *See* Resp. App. 18a-24a. As the district court noted, the question in *Ibanez* was "did the Plaintiff [bank] have 'the right . . . to foreclose the subject mortgage in light of the fact that the assignment of the foreclosed mortgage into the [bank] was *not executed or recorded* until *after* the exercise of the power of sale.'" Resp. App. 18a (emphasis and ellipsis in original), *citing* 2009 WL 3297551 at *1. Here, unlike *Ibanez*, Respondent had physical possession of the original note and allonges, and the assignments of mortgages to Respondent were of record with the Register before Respondent began publication of the notice of foreclosure under the Michigan statute. The district court correctly concluded:

> Thus, because [Petitioner] plainly understands that, unlike Massachusetts law, Michigan law does not permit the note and mortgage to be held by different parties, I find [Petitioner's] reliance on *Ibanez* – and [Petitioner's] misrepresentation of the legal basis on which *Ibanez* was decided – to be disingenuous at best.

Resp. App. 22a, n. 18.

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[9] Petitioner fails to note that the Massachusetts Land Court decision was affirmed on January 7, 2011. The affirmance has no impact on the issues before this Court

As noted, *Ibanez* is distinguishable from this case because the assignment of the foreclosed mortgage was in blank *at the time the mortgagee exercised the power of sale*. In the present case, while the assignment from Lehman Brothers initially was in blank, the name of the assignee (the Trust) was thereafter inserted into the assignment and properly recorded. The Trust, in turn, assigned the Mortgage to Respondent, and that assignment was in the record chain of title before the foreclosure by advertisement. As the district court noted, such assignments in blank are proper under Michigan law. *See* Pet. App. 45a-46a, *citing Mason Lumber Co. v. Collier*, 41 N.W. 913 (Mich. 1889) ("an assignment, like the one in question here, if filled in with the name of an assignee, after deliver[y] in blank, with the consent of the assignor, would become operative and valid in the party whose name was thus inserted").

In its brief to the Sixth Circuit, Petitioner merely suggested that *Ibanez* should be used as "guidance" since the decision was "not binding." C.A. Doc. 006110676609, p. 60. Given this timid suggestion, and because the district court thoroughly rejected *Ibanez* in its denial of its motion for reconsideration, Resp. App. 18a-24a, the Sixth Circuit did not discuss *Ibanez*.

Ibanez is distinguished from the present case by at least four factors: (1) *Ibanez* concerned a consumer "subprime mortgage" case rather than a substantial commercial mortgage where both sides were represented by counsel; (2) the foreclosing mortgagee in *Ibanez* was not in the record chain of title; (3) *Ibanez*

did not address the meaning of "record chain of title" as used in Michigan's foreclosure statute; and (4) *Ibanez* was based on a peculiarity of Massachusetts' common law of mortgages.[10]

III. This case is not the proper vehicle "to send a clear message" to "Too-Big-To-Fail" banks.

Petitioner shrilly urges this Court to "step into this thicket [of mortgage foreclosures]" and "send a clear message" to "Too-Big-To-Fail" banks because "Not enough courts . . . are willing to hold the big banks accountable, including the courts in which [Petitioner] is a party. . . . Mortgagors are the victims of this Wild West." Pet. 13, 26. In reality, the holder of the mortgage note is the subsidiary of a REMIC trust with numerous investors – not a "big bank" – and Petitioner simply wishes to delay foreclosure of a $16,300,000 commercial mortgage loan for as long as possible.

Petitioner has also made numerous misrepresentations and omissions of fact and law, which make this case a poor vehicle for review. Petitioner failed to

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[10] Massachusetts retains the medieval common law "title theory" of mortgages by which title to the property is deemed to have passed from the mortgagor to the mortgagee upon execution of the mortgage. *See Ibanez*, 2011 WL 38071, * 8 (Jan 7, 2011). In contrast, Michigan recognized the more contemporary "lien theory" of mortgages in the 19th century. *See Ladue v. Detroit & M. R. Co.*, 13 Mich 380, 87 Am. Dec 759 (1865).

discuss, or even disclose to this Court, the district court's 17-page opinion and order denying Petitioner's motion for reconsideration, Resp. App. 1a, the Pre-negotiation Agreement, Resp. App. 25a, the title searches that disclosed the chain of title, the district court's review of the original mortgage documents, and the holdings of the Sixth Circuit and the district court that Petitioner lacked standing to question intermediate transfers. Petitioner attempts to mislead this Court on the holding of the Michigan Supreme Court in *Arnold*. Both the district court and the Sixth Circuit referred to Petitioner's arguments as "disingenuous." Pet. App. 12a; Resp. App. 22a, n. 18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 17, 2011

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LIVONIA PROPERTY HOLDINGS, L.L.C.,

Plaintiff,

V.

12840-12976 FARMINGTON ROAD HOLDINGS, L.L.C.,

Defendant.

Civil No. 10-11589
Hon. John Feikens

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION [Dkt. 30]

I. INTRODUCTION

Plaintiff seeks reconsideration of this Court's Opinion and Order Denying Plaintiff's Motion for Preliminary Injunction and Dissolving Temporary Restraining Order (Dkt. 24). As Plaintiff correctly notes, to succeed on a motion for reconsideration, the moving party must demonstrate both a palpable defect and that a different disposition of the case will result from a correction of that defect. E.D. Mich. LR 7.1(h)(3). Although Plaintiff asserts certain challenges regarding its likelihood of success on the merits, it fails to challenge the Court's finding that "because Borrower is permitted to redeem after the sale, it has not shown that irreparable harm will occur at the

time of the foreclosure sale." (Dkt. 24 at 24). And, as I noted in my original Order, "a finding that there is no likelihood of irreparable harm . . . is usually fatal." (*Id.* at 8). Thus, regardless of any alleged "palpable defect", Plaintiff has not satisfied the requirements for a motion for reconsideration, and this Motion is therefore denied. Nevertheless, because the factors for granting an injunction must be balanced, I will address the Plaintiff's arguments regarding its likelihood of success.

II. ANALYSIS

Plaintiff raises several purported defects in my original Order: (1) the Court was misled with respect to the record chain of title; (2) the Court improperly found that allegedly-unrecorded-interim assignments do not create a defect in the record chain of title sufficient to prevent foreclosure by advertisement; (3) Defendant has not demonstrated adherence to all contracts providing for the assignment of the Mortgage and Note to each subsequent assignee; (4) Defendant has not demonstrated that the Trust was in existence at the time the Mortgage and Note were assigned to it; and (5) the Court improperly found that Plaintiff lacks standing to challenge the assignments.

First, a note about Plaintiff's standing. Plaintiff, as a mortgagor subject to foreclosure by advertisement, certainly has standing to challenge whether Defendant has complied with the statutory

requirements for that foreclosure. But it does not have standing to go beyond the statutory requirements to inspect each and every aspect of every contract or agreement between any predecessor and successor mortgagee, searching for "irregularities" and noncompliance. As Plaintiff acknowledges,[1] and as I previously explained in great detail, Plaintiff cannot avoid its contractual obligations under the Loan Documents (including the contractual right of foreclose by advertisement contained within the Mortgage) by arguing that the assignments of those documents were invalid or ineffective.[2] Thus, if Defendant has complied with the required statutory mandates and Defendant is the holder of Plaintiff's Note and Mortgage, it has the contractual and statutory right to foreclose by advertisement, and this Court will not enjoin Defendant from doing so.

Foreclosure by advertisement is "a matter of contract, authorized by the mortgagor, and ought not to be hampered by an unreasonably strict construction of the law." *Church & Church, Inc. v. A-1 Carpentry,* 766 N.W.2d 30, 36 (Mich. App. 2008); *National Airport Corp.*, 252 N.W.2d 519, 521 (Mich. App. 1977)

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[1] Plaintiff admits it "does not challenge the underlying obligation." (Pl Mot. for Recons. at 18).

[2] *See* Dkt. 24 at 15 ("Borrower certainly has an interest in avoiding foreclosure But the validity of the assignments does not effect *whether* Borrower owes its obligations, but only to *whom* Borrower is obligated "); *id.* at 17 ("Borrower cannot now step into the shoes of an assignor to assert its contract rights ")

("The power is part of the contract, and should be construed on principles applicable to contracts, and not as a hostile process.") (quoting *Reading v. Waterman,* 8 N.W. 691, 692 (Mich. 1881)). The Michigan Supreme Court has explained that substantial compliance with the statutory requirements for foreclosure by advertisement is all that is required:

> The statutes were intended to prevent surprise or unfairness, and they should be enforced in everything substantial. Courts cannot disregard any of their positive provisions. But on the other hand those provisions cannot be enlarged or unreasonably construed so as to render mortgage sales unsafe, or to make bidding hazardous. The law was designed to encourage and not to destroy recourse to these simple and cheap remedies; and while no substantial right should be disregarded, substantial regularity is all that should be [required].

Reading, 8 N.W. at 692 (emphasis added).

In *Peterson v. Jacobs,* the Michigan Supreme Court addressed whether a defect in the statutory requirements for foreclosure by advertisement rendered a foreclosure sale invalid. In that case, the plaintiff argued that the statute required a foreclosure notice to describe the names of every mortgagor and mortgagee, "irrespective of whether there was a complete and duly recorded reassignment by such assignee, or not." 6 N.W. 2d 533, 535 (Mich. 1942) (emphasis added). The Court found that failure

to mention assignments to and from an interim assignee, who held the mortgage for "some eight months," was not such a substantial irregularity as to render the foreclosure by advertisement void. *Id.* at 535-36.

Plaintiff argues that *Peterson* was decided pursuant to a prior version of the statute, which did not require "a record chain of title." As Plaintiff so aptly notes, however, the then-existing statute did require "a recording of the mortgage, and all assignments." (*See* Pl. Mot. for Recons. at 13 (citing *Feldman v. Equitable Trust Co.*, 278 Mich. 619, 625 (Mich. 1937))). Thus, while the language of the statute has changed, the requirement that the mortgage and assignments be recorded remains the same.[3]

Plaintiff next argues that when the *Peterson* court "announced" the rule that the foreclosure-by-advertisement statute requires only "substantial compliance," it referred only to the foreclosure notice.[4] I do not read *Peterson* so narrowly. The *Peterson* court

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[3] In fact, as Defendant correctly notes, the old language, requiring the recording of "the mortgage and all assignments," is more strict than the current language (applicable to this case), which requires only a record chain of title. And, the Michigan Supreme Court in *Arnold v. DMR Financial Services*, 532 N.W.2d 852 (Mich. 1995) construed M.C L. 600.3204 by relying upon *Feldman, supra*, which considered the predecessor statute. Thus, if the modification to the statute since *Peterson* favors either party, it favors Defendant.

[4] The substantial-compliance rule was "announced" at least as early as 1881, in *Reading*, 8 N W at 692.

based this "announcement" on the general principle that statutory foreclosures are matters of contract that "ought not be hampered by an unreasonable construction of the law." *Id.* at 535. Moreover, because the *Peterson* court considered the need to publish notice of assignments "whether . . . complete and duly recorded . . . or not," its holding implicitly recognizes that (1) mortgages may be validly "assigned" without a "complete and duly recorded" assignment document; and (2) those assignments do not prevent foreclosure by advertisement so long as they do not prevent "substantial compliance" with the statute.[5]

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[5] This is confirmed by the Michigan Supreme Court's later holdings in *Arnold* and *Feldman* (with *Feldman* construing the foreclosure-by-advertisement statute at issue in *Peterson*, and *Arnold* construing the amended statute)

In *Feldman*, the plaintiff, a mortgagor, complained that an unrecorded assignment (for security purposes) of a mortgage invalidated a foreclosure by advertisement The defendant, the mortgagee of record, argued that "the holder of an unrecorded assignment has no right to foreclose by advertisement and that the holder of the record title is the only proper party to institute such proceedings." 270 N.W. at 810. The Court adopted the defendant's reasoning and concluded that "[h]aving determined that the defendant company is the only party having the right to foreclose the mortgage by advertisement, and such foreclosure being regular and in accordance with the statute, the conclusion is inevitable that plaintiffs bill of complaint must be dismissed." *Id.* at 811

And *Arnold* addressed the same question under the successor version of the statute. In that case, again, the plaintiff argued that an unrecorded assignment (for security purposes) prevented foreclosure by advertisement because the statute required that all assignments be recorded. *Arnold*, 532 N.W 2d at 855. The court rejected the plaintiff's reading of the statute

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These implicit findings are consistent with Michigan precedent generally permitting assignments in blank. *See* (Dkt. 24 at 20 (citing authority)); *see also Kurbel v. O'Hair,* 240 N.W. 57 (Mich. 1932) (recognizing the validity of a deed executed in blank; "if the blank were filled up after delivery, the grantor, if he claimed the benefit of accompanying and related contracts, would thereby make the deed as completed his own, and preclude himself from objecting to the invalidity afterwards.") (quoting *Lockwood v. Bassett,* 14 N.W. 492, 493 (Mich. 1883)).

But the strict rule urged by Plaintiff – that every assignment of a mortgage must occur pursuant to an executed assignment document, naming the assignee at the time of execution, and thereafter recorded – would effectively prohibit all assignments in blank. Indeed, blank assignments are, by definition, not recorded and not recordable.[6] Under Plaintiff's reading,

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and adopted the *Feldman* reasoning: "we hold again, that [the foreclosure by advertisement statute] provided that only the record holder of the mortgage could foreclose by advertisement, and the mortgagor was not affected by the fact that others had an unrecorded interest in the mortgage." *Id.* at 856

Similarly here, the Defendant, as record holder of the mortgage, is the only party that may foreclose by advertisement The Plaintiff is unaffected by any other unrecorded interests (which may or may not have existed) in the mortgage

[6] Plaintiff asserts, without authority, that "Assignments of mortgages in blank ... are prohibited in Michigan as they violate the Michigan recording statute . in failing to identify the grantee and lack present intent." (Pl Mot. for Recons. at 8-9 n 7). Although an assignment of a mortgage in blank cannot be

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however, even after the blanks are filled in, and the assignment recorded to perfect an interest in the record chain of title, the assignee has not established his right to foreclose by advertisement because there could have been an interim holder of the blank assignment that did not record an entry in the chain of title. And, under Plaintiff's purported rule, a mortgagor attempting to avoid foreclosure by advertisement – a remedy to which he agreed by contract – could impose great expense and delay in the foreclosure process by alleging that the record-holder of the mortgage must prove the non-existence of interim holders of any assignments in blank (something the statute, itself, does not require). As the Michigan Supreme Court acknowledged, however, the foreclosure-by-advertisement statute "was designed to encourage and not to destroy recourse to these simple and cheap remedies." *Reading,* 8 N.W. at 692. It would be "perfectly useless and serve no good purpose" for interim holders of assignments in blank to

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recorded, it does not follow that it is "prohibited" in Michigan. Once the blanks have been completed, as the law permits, the assignment can be properly recorded and will then (and only then) establish notice of the listed assignee's interest in the chain of title The holder of an assignment in blank thus assumes some risk that an intervening party could record a superior interest in the chain of title during any period that the assignment remains "in blank" and unrecorded. *See Church & Church, Inc.,* 766 N.W 2d at 39 (explaining that Michigan's race-notice statute, which provides that any conveyance of real estate that is not recorded is void as against a subsequent purchaser in good faith, applies to mortgages).

execute and record separate assignment documents "unless such legal formalism is mandatory." *Peterson*, 6 N.W.2d at 536. I do not find that the law requires such formalism.

The substantial-compliance rule is also consistent with the purpose of the recording laws: "that the true state of the title be represented . . . in the public records . . . [and further] to protect an innocent purchaser." *See Harr v. Coolbaugh*, 59 N.W.2d 134 (Mich. 1953). The foreclosure by advertisement statute requires a "record chain of title . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage." M.C.L. 600.3204(3). The same statute also requires that the foreclosing party hold the original note. M.C.L. 600.3204(1). These rules permit only the party who holds the note and is record holder of the mortgage, with a record chain of title traceable to the original holder, to foreclose by advertisement. They also ensure that the mortgagor has notice of the party that is claiming that right (i.e., only the record holder of the mortgage).

Here, the Plaintiff acknowledges that a record chain of title exists evidencing transfers from the original mortgage holder (Lehman Brothers) to the Trust, and from the Trust to the current lender (Defendant). There are no unaccounted for or broken "links" in this chain. And, unlike many of the cases on

which Plaintiff relies,[7] the foreclosure by advertisement in this case was not initiated by someone outside the chain of title. Plaintiff, however, is unsatisfied with the record chain of title; instead it purports to challenge whether other assignment documents do or should exist, and if so, whether they must be recorded. There is no evidence that other assignments were executed, rather than that the original assignment was executed in blank, transferred in blank to each subsequent assignee (whomever those entities may be), and ultimately (approximately one month later) that the Trust affixed its name as the assignee and recorded the assignment to place all the world (including Plaintiff) on notice of its claim. Because Defendant has established a record chain of title from the original lender to it, it has substantially – if not completely – complied with the statutory requirements. Whether some interim assignee held an assignment in blank or any other unrecorded document does not alter or otherwise cloud the unbroken record chain of title in this case. In these circumstances, Plaintiff cannot credibly argue that it (or anyone else) will suffer "surprise or unfairness" if the foreclosure by advertisement proceeds. *See Reading*, 8 N.W. at 692.

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[7] In fact, almost every case upon which Plaintiff relies, including *Ibanez* (discussed extensively below) involves a foreclosure by advertisement initiated (and in some cases, completed) by a party that was not the record holder of the mortgage at the time the foreclosure was initiated.

Plaintiff also raises several arguments relating to whether the Court was misled about certain transfers of the Loan Documents. Among them, Plaintiff argues that the Court does not have "competent evidence" of the PSA or certain contracts between Lehman Brothers and LBHI. And, according to Plaintiff, the Court was misled as to whether SASC or SASC II was the proper party to the PSA, and whether that party (as depositor to the Trust) ever held the Note or Mortgage. Plaintiff also argues that the Trust was not in existence when the assignment to it was executed. According to Plaintiff, these "irregularities" alter or otherwise cast doubt on the "record chain of title." But the record chain of title is just that – the record chain of title.[8] The record chain of title demonstrates that Lehman Brothers assigned the Mortgage – directly or indirectly – to the Trust; and the Trust assigned the Mortgage – directly or indirectly – to the Defendant. The record does not suggest that some other entity claims (or may claim) an interest in the

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[8] Plaintiff has identified no authority suggesting that a record chain of title includes unrecorded documents By definition, the record chain of title is comprised of documents that were filed in the County Register of Deeds' office

By way of example only, Plaintiff claims that Defendant's representation that the "record chain of title consisted of an Assignment from Lehman Brothers, FSB to the LB-UBS Commercial Mortgage Trust 2005-CI, (the "Trust") and then from the Trust to the Defendant" is "untrue " On the contrary, that is exactly what the record chain of title consists of – nothing more.

Mortgage.[9] And as discussed extensively in the original Order, the parties to any assignments appear to have ratified or otherwise acquiesced to the transfers and are not challenging them here or attempting to assert any rights in the Loan Documents. Moreover, as discussed below, by virtue of the fact that Defendant is the holder of the Note, it also holds the Mortgage by operation of law. Finally, regardless of what contracts exist between which entities, Plaintiff was not and is not a party to any of those contracts (including the assignments), and lacks standing to challenge their validity or the parties' compliance with those contracts here.

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[9] In another case cited by Plaintiff, the Michigan Supreme Court explained that "it is the plain intent of [the foreclosure by advertisement] statute that it is a condition precedent to the right to foreclosure by advertisement that the title of an assignee of a mortgage appear of record, and of record in such a manner that evidence extraneous to the record will not be needed to put it beyond reasonable question." *Feldman v. Equitable Trust Co.*, 278 Mich. 619, 625 (Mich. 1937). In this case, without consideration of extrinsic evidence, the record identifies Defendant as the current assignee of the Mortgage. It is only by inspecting extrinsic evidence that Plaintiff can cast "doubt" on the record chain of title by suggesting that there were, in fact, other entities that held an assignment in blank before it was completed and recorded. The statute did not create a system inviting mortgagors to delve into the business dealings of their lenders to determine their compliance with all of their contractual obligations. It offers certain protections to mortgagors, sufficient to ensure they are not at risk of competing claims. And, it offers certain protections to purchasers at a foreclosure sale so that they may purchase a clean title. Those protections are satisfied in this case.

Although it is not binding precedent, the Bankruptcy Court for the District of Massachusetts was faced with many similar arguments in *In re Almeida*, 417 B.R. 140 (Bankr. D. Mass. 2009), which addressed a trust's standing to obtain relief from the automatic stay in order to foreclose a mortgage.[10] In that case, the trust established that it was the holder of the original note and mortgage. *Id.* at 142-43. But a third party claimed that the trust nevertheless lacked standing for relief from the stay because the note was not properly negotiated, and "mere possession of a mortgage does not grant the possessor any rights under the mortgage, such as the right to foreclose it." *Id.* at 147-148. The third party also claimed that the assignment of the mortgage was invalid because it failed to comply with certain terms of a Pooling and Servicing Agreement (PSA), which the third party claimed required the mortgage to be assigned to an interim entity (defined as the Depositor in the PSA) before being assigned to the trust. *Id.* at 148. And finally, the third party challenged the timing of some of the assignment transactions. *Id.*

The *Almeida* court first acknowledged the assignee's possession of the note, and the validity of assignments in blank, in general.[11] *Id.* at 148-49. As

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[10] The challenges to the trust's standing to obtain relief from stay in *Almeida* were similar to Plaintiff's challenges to the Defendant's standing to foreclose by advertisement.

[11] Notably, although both *Almeida* and *Ibanez*, *infra*, are Massachusetts decisions, *Almeida* suggests that assignments of

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the holder of the note, the trust had standing to seek payment thereof. *Id.* at 149. The court then explained that, to the extent that the assignment was made without actual authority, that defect was remedied through the assignor's ratification or acquiescence. *Id.* Finally, the court addressed the argument regarding the alleged "invalidity of the Mortgage Assignments because there was no interim assignment of the Mortgage to [the interim depositor entity]:"

> A failure to follow this protocol – such as by direct assignment of the mortgage from the loan originator to the pool trustee, bypassing the depositor – would, the Debtor contends, constitute a breach of the PSA. . . . The Debtor argues that because the Confirmatory Assignment is a direct assignment from [the original holder] to [the trust] that bypasses the depositor, it must be invalid. This argument falls far short of its goal. Even if this direct assignment were somehow violative of the PSA, giving rise to unfavorable tax, regulatory, contractual, and tort consequences, neither the PSA nor those consequences would render the assignment itself invalid.

Id. at 149 (emphasis added) (quoting *In re Samuels*, 415 B.R. 8, 22-23 (Banks. D. Mass. 2009)). The court

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blank are valid in Massachusetts, while *Ibanez* reaches the opposite conclusion. This distinction is irrelevant here because Michigan permits assignments in blank.

also noted that the third party lacked standing to challenge the validity of the assignments:

> [The third-party] is not a third party beneficiary of the PSA, and, ironically, he would appear to lack standing to object to any breaches of the terms of the PSA. It would appear to this Court that the investors who bought securities based upon the pooled mortgages would be the parties with standing to object to any defects in those mortgages resulting from any failure to abide by the express provisions of the PSA.

Id. at 149 n. 4 (emphasis added). Ultimately, the court found the direct assignment from the original holder to the trust, bypassing assignment to the depositor, "was sufficient to confer standing" to the trust to seek relief from the automatic stay. *Id.* at 150.

I am persuaded by the court's analysis in *Almeida*. Just as in that case, the Defendant here has established that it is the holder of the original Note and Mortgage. And, just as in *Almeida*, the Plaintiff here lacks standing to assert any breaches in the terms of any contracts between the assigning entities. (Dkt. 24 at 15-18 (discussing Plaintiff's lack of standing to challenge validity of contracts to which it is not a party)). Moreover, any purported breaches in those contracts would not render the assignments themselves (which are separate contracts) void. And by transferring the original Loan Documents, including the Note, Mortgage, and all Assignments, all

assigning entities appear to have ratified any alleged breaches in the terms of those contracts.

Plaintiff next suggests that because the right to foreclose by advertisement is contractual, "unequivocally, the Defendant must establish that there is a valid contract for each link in the chain of title that ultimately resulted in the Defendant 'owning' the Note and Mortgage." (Pl. Mot. for Recons. at 11; *see also id.* at 8 n. 6 ("Defendant . . . must show how the right [to foreclose by advertisement] contractually passed from entity to entity.")). First, I note that this argument is simply Plaintiff's most recent attempt to challenge the validity of the assignments and avoid its obligations under the Mortgage by claiming that the power of sale contained in the Mortgage may not be enforced by Defendant. Plaintiff cleverly argues that it is not attempting to avoid its obligations, but instead is challenging Defendant's standing to foreclose by advertisement. But, Plaintiff's arguments reach far beyond challenging Defendant's compliance with the statutory mandates, and extend into analyzing whether there are "valid contract[s] for each link in the chain of title" and whether the parties to those contracts complied specifically with their terms. In other words, Plaintiff seeks to challenge whether each and every entity that ever held an interest in Plaintiff's Note and Mortgage complied to the letter with the terms of each and every contract between it and its successor. These are <u>exactly</u> the types of challenges that Plaintiff, as a stranger to those contracts, lacks standing to assert. Plaintiff, a mortgagor,

contractually agreed to permit its mortgagee to foreclose by advertisement. For all of the reasons articulated in the original Order, and the reasons contained herein, Defendant appears to be the holder of Plaintiff's Mortgage.[12] So long as Defendant complies with its statutory obligations, and it appears to have so complied, it (and only it) may foreclose by advertisement.

Moreover, Plaintiff has cited no authority purporting to require a entity foreclosing by advertisement to prove the validity of and conformance with the underlying contracts pursuant to which assignments of the loan documents were executed, nor have I identified any such authority. By its terms, the foreclosure-by-advertisement statute does not require a foreclosing party to conclusively establish a valid contract for each link in the title; it requires only a record chain of title. As discussed, the statute provides protections allowing a mortgagor to ensure that any party foreclosing by advertisement possesses the original Note, and has (at the time it initiates the foreclosure proceedings) a recorded interest traceable

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[12] Those reasons include, but are not limited to, Defendant is the holder of the indebtedness; each predecessor holder of the mortgage transferred the original Loan Documents to Defendant; each predecessor holder appears to have ratified or adopted the transfers, thus curing any breaches in underlying contracts; and Plaintiff may be barred from challenging Defendant's right to enforce the mortgage (and its contractual power to foreclose by advertisement) by laches, estoppel, waiver, and/or ratification.

to the original mortgage holder. The Defendant here has satisfied those requirements.

I will close by addressing Plaintiff's reliance on *U.S. Bank Nat'l Assoc. v. Ibanez,* No. 08-Misc-384283, 2009 WL 3297551 (Mass. Land Ct. Oct. 14, 2009). According to Plaintiff, although not binding, *Ibanez* "provides an excellent analysis and guidance of some of the issues in this case." (Pl. Mot. for Recons. at 15). That decision, which has resulted in considerable commentary, currently is on appeal directly to the Massachusetts Supreme Judicial Court, scheduled for argument in September.

In *Ibanez,* as relevant here, the Massachusetts Land Court considered the following question: "did the plaintiff [bank] have 'the right . . . to foreclose the subject mortgage in light of the fact that the assignment of the foreclosed mortgage into the [bank] was *not executed or recorded* until *after* the exercise of the power of sale.'" *Ibanez,* 2009 WL 3297551 at *1 (emphasis and omission in original). Specifically, the bank did not obtain or record an assignment of the subject mortgage until fourteen months after the foreclosure sale was concluded.[13] *Id.* at *2 n. 9. At the time of the foreclosure sale, the bank possessed the original note and mortgage, each endorsed in blank.

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[13] Massachusetts law differs from Michigan law in that it "requires that a foreclosing party have a valid assignment of the mortgage at the time of notice and sale, but it does not require the assignment to be 'of record' at that time." *Id.* at *1 n. 7

Id. at *2. As Plaintiff explains, as in this case, those blank-endorsed documents changed hands multiple times before the foreclosing bank obtained them;[14] each transfer occurred without appearing in the public record.[15] *Id.* at *5. The court inspected the underlying contracts providing for the assignment of the loan documents and determined that some terms of those contracts appeared to have been breached by the parties thereto. Specifically, the agreements required that the mortgage assignment to the bank be "in recordable form at the time the loans were transferred." *Id.* at *8. According to Plaintiff, the court found that because only blank assignments were transferred, "in reality, the mortgages themselves were thus still held by the Originator." (Pl. Mot. for Recons. at 16). And, Plaintiff claims, the court found that because the power to foreclose by advertisement is contractual, the violation of the terms of the contract prevented the foreclosure. (*Id.* at 16-17).

But, a closer inspection of the *Ibanez* opinion reveals that the court's holding was based on a very different analysis. Specifically, the court found that

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[14] Plaintiff is quick to point out that several of the entities involved in this case were also involved in the mortgage transfers in *Ibanez*. The similarity of parties is not relevant to the analysis of this case.

[15] And, as in this case, the interim transfers occurred by virtue of the transfer of the blank-endorsed documents (i.e. without separate assignment documents being executed for each assignment).

"since the blank mortgage assignments failed to name an assignee, they were ineffective to transfer any interest in the mortgage." *Ibanez*, 2009 WL 3297551 at *5. "This is so," it explained, "because Massachusetts follows the 'title theory' of mortgages, making them a type of deed." *Id.* at *5 n. 27. "Under [Massachusetts'] title theory of mortgages, a mortgage of real estate is a conveyance of the title or of some interest therein defensible upon the payment of money or the performance of some other condition. Literally, in Massachusetts, the granting of a mortgage vests title in the mortgage to the land placed as security for the underlying debt." *Id.* (quoting *Faneuil Investors Group, L.P. v. Bd. of Selectmen of Dennis*, 75 Mass. App. Ct. 260, 264-65 (2009)). Thus, although the bank held the blank-endorsed documents and could enforce the note as "bearer paper", "since the blank mortgage assignment was ineffective, the mortgage remained with [the originator]." *Id.* at *6. And, accordingly, although the court did find that the terms of the contracts providing for assignments required the assignments to be in recordable form, it was the fact that blank assignments are ineffective in Massachusetts – not the fact that they breached the terms of the contracts – that invalidated the assignments. *Id.* at *8 (explaining that the only mortgage assignment executed was "the ineffective blank mortgage assignment", thus the note was held by the bank but the mortgage securing that note was still held by the originator).

The *Ibanez* court also analyzed the question of whether the bank should be deemed the "present holder of the mortgage" by virtue of the fact that it was the present holder of the note and blank mortgage assignments. *Id.* at *10. The court rejected this argument for two reasons: (1) "the blank mortgage assignments they possessed transferred nothing" under Massachusetts law (applying analysis regarding the title-theory of mortgages discussed above); and (2) in Massachusetts, "even a valid transfer of the note does not automatically transfer the mortgage. The holder of the mortgage and the holder of the note may be different persons." *Id.* at *11 (citation and internal quotation omitted). Notably, even the *Ibanez* court recognized that an assignment to the bank from the last assignee of record would be sufficient – without the necessity to obtain or record assignments for each interim transfer. *Id.* at *11 n. 48.[16]

I decline to adopt the reasoning of *Ibanez* because the Massachusetts law on which it relies differs from Michigan law in two important aspects.[17] First, unlike

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[16] Of course, if another assignment was recorded before the bank recorded its assignment, the bank's assignment would again be outside the record chain of title, and the bank would need to obtain an assignment from the *new* assignee of record. *Id.* at *11 n. 48

[17] I also believe the Massachusetts court erred in inspecting the underlying contracts, and any purported breaches in them, where no parties thereto were challenging their validity or effect. But, as explained above, the court's holding did not turn on that analysis so it does not form a basis for my decision here.

Massachusetts, Michigan does not follow the "title theory of mortgages." "Under Michigan law, a mortgage is not an estate in land, it is a lien on real property intended to secure performance or payment of an obligation." *Prime Financial Services v. Vinton*, 761 N.W.2d 694, 703 (Mich. App. 2008) (internal citations omitted); *see also Equitable Trust Co. v. Milton Realty Co.*, 249 N.W. 30, 31 (Mich. 1933) ("A real estate mortgage in this state is but a security, in the nature of a specific lien, for the debt.") (internal quotation and citation omitted). Second, unlike in Massachusetts, in Michigan, a mortgage cannot exist separately from the underlying note. *Prime Financial*, 761 N.W.2d at 703. "A mortgage is a mere security interest incident to an underlying obligation, and the transfer of a note necessarily includes a transfer of the mortgage with it. For the same reason, a transfer of a mortgage without the underlying obligation 'is a mere nullity.'"[18] *Id.* (citing *Ginsburg v. Capital City*

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[18] Plaintiff, in fact, recognized this Michigan doctrine in its original Motion for a Preliminary Injunction (Pl. Mot. for Prelim Inj. at 10) ("the decisive weight of authority . . holds that an assignment of a mortgage without the underlying debt is a nullity, and therefore unenforceable. A security interest cannot exist, much less be transferred, independent from the obligation which it secures The security interest follows the debt . . If the debt is not transferred, neither is the security interest.") (internal citations omitted). Thus, because Plaintiff plainly understands that, unlike Massachusetts law, Michigan law does not permit a note and mortgage to be held by different parties, I find Plaintiff's reliance on *Ibanez* – and Plaintiff's misrepresentation of the legal basis on which *Ibanez* was decided – to be disingenuous at best.

Wrecking Co., 2. N.W.2d 892 (Mich. 1942));. Thus, when an assignee takes ownership of a note, the underlying mortgage transfers to it by operation of law. *Id.* at 710; *see also id. at* 704 (explaining that, in Michigan, the interests in a mortgage are ascertained by determining whether and to what extent an assignor grants its interest in a note); *Equitable Trust Co,* 249 N.W. at 31 ("A transfer or assignment of the obligation operates as an assignment of the mortgage.") (citation omitted).

Accordingly, under Michigan law, unlike in *Ibanez,* even if the assignment in blank of the mortgage was ineffective – and I do not believe it was – because Defendant possesses the Note, the Mortgage incident to that Note transferred to Defendant by operation of law.[19]

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[19] Plaintiff makes a last-ditch effort to save its argument by suggesting that the various contracts assigning the notes and mortgages to subsequent mortgagees may have reserved rights in the original Note holder, or may have lacked consideration, or may not have been valid under the laws of the State governing those contracts. (Pl. Mot for Recons. at 7). Plaintiff cites the Restatement 3d of Property· Mortgages § 5 4 for the proposition that a transfer of a note "also transfers the mortgage unless the parties to the transfer agree otherwise" (*Id* at 7 n 4 & Ex 12 thereto (emphasis added)). But, Plaintiff has cited no binding authority contradicting the Michigan doctrine that a transfer of a note transfers the mortgage by operation of law – without regard to any "agree[ment] otherwise." And, because Defendant is therefore the assignee of the Mortgage, the remaining arguments also fail. Even if this issue was not dispositive as to Defendant's standing to foreclose by advertisement, as discussed, Plaintiff lacks standing to challenge whether the underlying contracts were valid under the law or lacked consideration. Plaintiff cannot circumvent its need for standing by

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And, notwithstanding all of Plaintiff's arguments regarding breaches of contracts, incorrectly-named parties, and "irregularities" in assignment documents, just as Defendant is entitled to collect the debt, it is entitled to enforce the other provisions of the Mortgage – including the power of sale.

II. CONCLUSION

Defendant is the holder of the Note, and the record holder of the Mortgage with a record chain of title traceable back to the original mortgagee. As such, as explained in my prior Order, Plaintiff cannot establish a likelihood of success on its claims. Moreover, Plaintiff has not challenged my previous finding that it cannot establish a likelihood of irreparable harm. Therefore, I now confirm my finding that Plaintiff is not entitled to a preliminary injunction. Plaintiff's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

Date: June 14, 2010

s/ John Feikens
John Feikens
United States
District Judge

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couching its argument as an objection to Defendant's standing; Defendant holds the Note, has satisfied the statutory requirement to establish a record chain of title, and is the assignee of the Mortgage.

APPENDIX B

CWCapital
ASSET MANAGEMENT

December 22nd, 2009

VIA EMAIL

Livonia Properties Holdings, L.L.C
36700 Grand River Avenue
Farmington Hills, MI 48335
Attn: David Clapper

RE: That certain loan in the original principal amount of $16,300,000 as evidenced by a Promissory Note dated December 30th, 2004 (the "Note") executed by LIVONIA PROPERTIES HOLDINGS L.L.C. ("Original Borrower") and made payable to LEHMAN BORTHERS BANK, FSB,, (together with its successors and assigns, "Lender"), which Note is currently held by Bank of America, NA. as successor by merger to LaSalle Bank National Association as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C1, Commercial Mortgage Pass-Through Certificates, Series 2005-C1 ("Holder"), (The Note and all other documents executed in connection with the Note shall be collectively referred to as the "Loan Documents")

Dear Mr. Clapper:

I write on behalf of CWCapital Asset Management LLC ("CWCAM"), solely in its capacity as Special Servicer on behalf of Holder.

Borrower desires to engage in discussions with Holder relating to the obligations it owes to Holder and wants to discuss various courses of actions which may be in the party's mutual interests. Holder is agreeable to participate in such discussions provided that Holder and Borrower enter into this Agreement to mutually acknowledge the nature of, and certain understandings with respect to, the proposed discussions. This letter constitutes an agreement between Holder and the Borrower with respect to negotiations concerning the Loan and the Loan Documents; accordingly, for good and valuable consideration, Holder and Borrower agree as follows.

1. Negotiations. The parties to this letter agreement acknowledge that they are about to commence negotiations (the "Negotiations") concerning the obligations owed to Holder by the Borrower and that they intend to discuss various courses of action which will include those that they believe may be in their mutual interests, with a view to a compromise and settlement by the parties. Accordingly, the parties expressly stipulate and agree that both the content and the existence of statements and communications among the parties created during such Negotiations shall remain protected and no part of any oral or written communication from Holder during such Negotiations shall be admissible or subject to discovery in any case or proceedings or be used for any other purpose, including, without limitation, proof of admissions of liability; provided, however, that this paragraph shall not pertain to information which in the absence of this

letter agreement would be available for inspection or review by Holder pursuant to the Loan Documents.

The Borrower agrees to provide the following documents as soon as reasonably possible:

1. Financial statements Year-End 2007, 2008 and YTD 2009 to include cash flow, income statement and balance sheet
2. Current Rent Roll
3. 2008 and 2009 (or 2010, if available) Budgeted CAM/Tax Reconciliations (if available)
4. Market information (competitors)
5. Marketing plan.
6. 2010 Operating Budget.
7. 12 month cash flow projections.
8. Capital expenditures scheduled in the next 12 months and completed in last 24 months
9. List of third party contracts including vendor contact information.
10. Most recent aged Accounts Payable and Receivable reports.
11. Detailed workout plan
12. Valid Certificate of insurance

2. Agreements to be Writing. This letter agreement will confirm that, while there may be many matters which the parties hope to discuss, no agreement reached with respect to any matter (including, without limitation, any waiver of any right or remedy)

shall have any effect whatsoever unless such agreement is reduced to writing, signed and delivered by all parties' authorized representatives. This letter agreement may be amended only by a written agreement signed by and delivered by all parties' authorized representatives. No officer or employee is authorized to commit Holder verbally to any agreement, or to any modification of the existing Loan Documents, and Borrower may not rely on any verbal communication or anything else from Holder or any of its officers or employees which may be construed to the contrary.

3. The Loan Documents in Force. The Loan Documents are in full force and effect and are binding on the Borrower in accordance with their terms. The Borrower shall continue to be bound to their terms, except only to the extent that such Loan Documents may hereafter be modified by a written agreement duly signed and delivered as described in paragraph 2, above. This Agreement shall not be construed as an amendment, novation, accord and satisfaction, estoppel, or waiver of Holder's rights under the Loan Documents. Nothing contained herein shall limit Holder in initiating, continuing or otherwise proceeding to exercise any right or remedy available to Holder under the Loan Documents or otherwise.

4. Status of Obligations. Notwithstanding the commencement or continuation of discussions or negotiations, Holder has not and does not waive the existence of any events of default under the Loan Documents or any rights and remedies that Holder

may have. Holder shall not be limited or restricted from enforcing any rights or remedies available to it, including, without limitation, commencing judicial or non-judicial foreclosure proceedings, seeking the appointment of a receiver, collecting rents and profits or otherwise exercising its remedies, and Holder expressly reserves all such rights and remedies. Borrower hereby acknowledges and agrees that there have been no modifications to the Loan Documents and the Loan Documents constitute all of the agreements among Holder and Borrower and the Loan Documents continue to constitute Borrower's legal and enforceable obligations. Borrower acknowledges and agrees that no fiduciary or special relationship with Holder is created by this document, the participation of Holder in any of the Negotiations herein contemplated, or otherwise. Borrower specifically acknowledges and agrees that Holder has made no promise, commitment, or representation whatsoever, nor has Holder any obligation to Borrower to modify the terms of the Loan, offer any discounted payoff of the Loan, refinance the Loan, grant any forbearances, extend the payment terms of the Loan or extend any other financial accommodation to Borrower.

5. Authorized Representatives. Each of the parties will designate in writing who is his, her or its representative for the Negotiations. The persons whose names, addresses and telephone numbers are listed on Exhibit "A" attached hereto have been designated as such representatives as of the date of this letter agreement. Any party hereto may, by notice to the

other, designate additional or substitute representatives. The individuals who sign this letter agreement on Holder's behalf and those who conduct the Negotiations on Holder's behalf do not have the authority to bind Holder to any amendment or modification of or changes in the Loan Documents or to any waiver or release of, or relief concerning, any provision thereof or any default of or requirement applicable to Borrower thereunder or any right or remedy of Holder thereunder. If any of such individuals agree (orally or otherwise), or conclude that it may be appropriate to agree, with Borrower concerning any proposed modification to or amendment of any of the Loan Documents or any modification of any of the obligations thereunder (the "Obligations"), they will summarize that proposed agreement in a non-binding letter of intent ("Letter of Intent") which, when approved in writing by Borrower, will provide the basis for their recommendation to the appropriate senior management of Holder that such a loan modification be authorized by Holder. If such authorization is granted, Borrower will be notified in writing (such notice is referred to herein as an "Authorization Notice"), and only after such notification and full, strict, and timely compliance by Borrower with all of the requirements, terms, and conditions of the Letter of Intent and the Authorization Notice (including, without limitation, the execution and delivery of Borrower and Holder of a definitive, formal written agreement prepared and signed by Holder that expressly amends or modifies one or more Loan Documents or Obligations) will any

modification of any of the Loan Documents or Obligations be binding on Holder.

6. Alternative Opportunities. Since the parties recognize that these Negotiations may not produce a mutually acceptable resolution of the overall problem, Borrower must be and is responsible for operating its business in a manner it deems appropriate. In particular, Borrower should not forego acceptable alternative opportunities, if any, while such Negotiations are pending, including without limitation, any refinancing, sale, lease or other disposition of the underlying real estate collateral, and in each case, subject to the terms of the Loan Documents. Borrower acknowledges that it may not in any way rely on, or claim reliance on, the Negotiations.

7. Tolling of Statutes of Limitations. The parties agree that the running of all statutes of limitations or doctrine of laches applicable to any claims or causes of action, including without limitation, all avoidance actions under Chapter 5 of Title 11 of the United States Code, or applicable state fraudulent conveyance statutes that might be brought by or on behalf of Holder in a proceeding under said Title 11 or under applicable law, are tolled and suspended during the period commencing as of the transmission date of this letter agreement and ending thirty (30) days following receipt of notice terminating the Negotiations described in this letter agreement.

8. Termination. Any party shall have the right to terminate the Negotiations at any time upon written

notice to the other party, without obligation or liability by virtue of the commencement or termination of Negotiations hereunder or the passage of time associated therewith and upon such termination, the parties' respective obligations to one another shall be only as set forth in the Loan Documents, except that the provisions of this letter agreement shall survive.

9. Notice. All notices given hereunder shall be in writing and sent by certified or registered mail, return receipt requested, by overnight courier service or by facsimile with proper confirmation, to the other parties' authorized representative.

10. Payment Statements. From time to time, Holder has sent and may send to the Borrower payment statements. The payment statements are generated for the Borrower's information and convenience only, and the billing statements do not waive, amend or alter the Borrower's obligations under the Loan Documents.

11. Expense Reimbursement. In addition to Borrower's reimbursement obligations in the Loan Documents, Borrower agrees to reimburse CWCAM for all of its out-of-pocket expenses incurred in pursuit of these discussions and negotiations, including, without limitation, attorneys' fees and costs. property inspection costs, appraisal fees, engineering fees, title and housing violation search costs, and costs of obtaining certified rent rolls. Payment of some or all of such out-of-pocket expenses may be required in advance as a condition to proceeding with discussions.

12. Borrower Cooperation. Borrower will cooperate with Holder, its agents and its representatives, to allow Holder to conduct environmental site assessments, site inspections, structural studies, audits, appraisals and other evaluations of the property encumbered by the Loan. Furthermore, Borrower agrees to furnish Holder, upon request and in a form acceptable to Holder, with current, complete and accurate financial statements for Borrower, and with current operating statements and balance sheets for the operation of the real property securing the Loan. All such information must be signed by the person submitting it and certified as true, correct and complete and shall not be subject to the confidentiality provisions of Paragraph 1 of this letter agreement.

13. Rents and Profits as Cash Collateral. Borrower and each of its general partners or managing members hereby agree(s) and acknowledge(s) that the rents, income, revenues, accounts, receipts, issues, and profits, and other payments, whether now existing or hereafter arising under or generated by the collateral securing the Loan ("Rents and Profits") are and shall be deemed a part of Holder's "Cash Collateral" under Section 363 of Title 11 of the United States Code, as amended (the "Bankruptcy Code") in the event that Borrower files a voluntary petition in bankruptcy or is made subject to any involuntary bankruptcy proceeding. Borrower may not use Cash Collateral without the consent of Holder and/or an order of any bankruptcy court, pursuant to Section 363(b)(2) of the Bankruptcy Code, and Borrower

hereby waives any right it may have to assert that Holder's security interest in the Rents and Profits does not constitute Cash Collateral. No consent by Holder to the use of Cash Collateral by Borrower shall be deemed to constitute Holder's approval of the purpose for which such Cash Collateral was expended. Borrower further agrees that if it is determined that any of the rights granted Holder pursuant to the Loan Documents constitute a security interest in or lien against the Rents and Profits, such shall be deemed perfected, "choate," and enforced, without the necessity of making any demand, filing any documents or commencing any proceeding that may otherwise be required under non-bankruptcy law for the perfection or enforcement of security interests, with such perfection and enforcement being binding upon Borrower and any subsequently appointed trustee in any case under the Bankruptcy Code.

14. Voluntary Agreement. Borrower represents and warrants to Holder that Borrower is represented by legal counsel of its choice, that it has consulted with such counsel regarding this letter agreement, that it is fully aware of the terms and provisions contained herein and of their effect, and that it has voluntarily and without coercion or duress of any kind entered into this Agreement.

15. No Claims Against Holder. Borrower acknowledges and agrees that it currently holds no claim against Holder, including, but not limited to, setoff, recoupment, estoppel, waiver, cancellation of instruments, rescission, novation or excuse of performance

under the Loan Documents by virtue of any action(s) or inaction(s) of Holder or any of its predecessors-in-interest, if any.

16. Miscellaneous. This letter agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective heirs, successors and assigns, and shall be governed by, an interpreted in accordance with, the laws of the State of Michigan. Paragraph headings used in this letter agreement are for convenience only and shall not be used to interpret any term hereof. This letter agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which taken together shall constitute one agreement. Each person executing this letter agreement on behalf of a party represents to the other party that such person has the full authority and legal power to do so. The parties hereto agree that their electronically transmitted signatures on this letter agreement shall have the same effect as manually transmitted signatures.

Should you have any questions, please contact myself or Kinnery Ardeshna. I can be reached directly at 202-715-9555 or via email at dsmith@cwcapital.com

and Kinnery can be reached directly at 202-715-9582 or via email at kardeshna@cwcapital.com.

Sincerely,

Bank of America, N.A. as successor by merger to LaSalle Bank National Association as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C1, Commercial Mortgage Pass-Through Certificates, Series 2005-C1

CWCapital Asset Management LLC, solely in its capacity as Special Servicer for Holder

/s/ David H. Smith
By: Name: David H. Smith
Title: Vice President

Consented and agreed to this 7 day of January, 2010

By: LIVONIA PROPERTIES HOLDINGS, L.L.C
A Michigan limited liability company

By: Atlantic XV Manager, Inc,
A Michigan corporation, its Manager

/s/ D M Clapper
Name: David M. Clapper
Title: President

cc: _____
_____
_____
_____

GUARANTOR'S ACKNOWLEDGMENT

By Guarantor's signature below, Guarantor consents to the terms of this letter agreement and acknowledges that this letter agreement does not alter, amend, diminish, waive or discharge the Borrower's obligations to Holder under the Loan Documents in any way. Guarantor further agrees that this letter agreement does not alter, amend, diminish, waive or discharge Guarantor's obligations to Holder under any indemnity, and Guarantor agrees to continue to be bound under the terms of the indemnity in the event that the Loan Documents are modified as provided in Paragraph 5 of this Letter Agreement, without further notice or consent. To the extent that notice and/or Guarantor's consent may be required as a condition precedent to continued liability under any indemnity, such notice and consent are hereby waived. Guarantor agrees that it is bound and shall continue to be bound to Holder under its indemnity during the course of the Negotiations and following any termination of the letter agreement.

Consented and agreed to this ___ day of _____

By: GUARANTOR:

By: /s/ D M Clapper
Name: David M. Clapper,
an individual

EXHIBIT "A"

Schedule of Representatives

The authorized representatives of the parties are as follows:

Holder's Representatives:

Name: Dave Smith
Address: CWCapital Asset Management LLC
701 13th Street, NW, Suite 1000
Washington, D.C. 20005
Phone: 202-715-9555
Fax No.: 202-715-9699
Email: dsmith@cwcapital.com

Name: Kinnery Ardeshna
Address: CWCapital Asset Management LLC
701 13th Street, NW, Suite 1000
Washington, D.C. 20005
Phone: 202-715-9582
Fax No.: 202-715-9699
Email kardeshna@cwcapital.com

Borrower's Representatives:

David M. Clapper
36700 Grand River Ave.
Farmington Hills, Mi 48335
248-442-2700
248-442-1488 fax
clapperdm@yahoo.com

Andrew Mychalowych
37000 Grand River Ave.
Farmington Hills, MI 48335
248-442-0510
248-442-0518 fax
amychalowych@smvf-law.com

Joseph Vindici
554 Whitehall Rd
Bloomfield Hills, MI 48304
248-760-1011
jvindici@yahoo.com

APPENDIX C

[LOGO] **House Legislative Analysis Section**

Olds Plaza Building,
10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

FORECLOSURE PROCEEDINGS

House Bill 5721
Sponsor: Rep. Gary Randall
Committee:
Business and Finance

Complete to 9-12-94

A SUMMARY OF HOUSE BILL 5721 AS INTRODUCED 9-13-94

The Revised Judicature Act governs the prerequisites of the sale, notice of foreclosure and publication, sale mechanisms, and redemption procedures that control mortgage foreclosures by advertisement. Among other things, the act requires that a mortgage that contains a power of sale be properly recorded. In addition, if the mortgage has been assigned (transferred), all assignments must be recorded. House Bill 5721 would delete this latter provision, and would require, instead, that only assignments for the foreclosing party be recorded, and then only if the party foreclosing were not the original mortgagee.

The act also requires that, before a property can be redeemed from foreclosure, a mortgagor must repay, with interest, the costs of taxes or insurance premiums paid by the foreclosure purchaser. House

Bill 5721 would require also that amounts paid for senior liens or encumbrances be repaid..

MCL 600.4304 et al.

[LOGO] **House Legislative Analysis Section**

Olds Plaza Building,
10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

FORECLOSURE BY ADVERTISEMENT

House Bill 5721
(Substitute H-1)
First Analysis (9-20-94)

Sponsor:
Rep. Gary L. Randall
Committee:
Business and Finance

THE APPARENT PROBLEM:

The Revised Judicature Act (RJA) sets forth the procedures for foreclosing by advertisement, by far the most common method of foreclosure, which involves publication and posting of foreclosure and sale notices. (For simplicity, this analysis will refer to "foreclosure" to mean foreclosure by advertisement under the applicable article of the Revised Judicature Act.) Recent decisions of the Michigan Supreme Court have suggested that the foreclosure procedures of the act must be strictly followed.

In its 1993 decision on *Senters v Ottawa Savings Bank* (443 Mich 45), the court held that foreclosure sales by advertisement are defined and regulated by statute. The court said that once a mortgagee elects to foreclose by this method, Chapter 32 of the Revised Judicature Act governs the prerequisites of the sale, notice of foreclosure and publication, mechanisms of the sale, and redemption. This reasoning was used to uphold a former mortgagor's redemption of property from the foreclosure sale purchaser (who was also the

original mortgagee, or mortgage lender) without reimbursing the mortgagee/purchaser for a construction lien it had paid following its purchase of the property at its own foreclosure sale. Since statute did not require reimbursement for such liens under such circumstances, the property could be redeemed without the mortgagor paying that sum in addition to the statutorily-prescribed amounts.

Of more urgent concern to many, however, are the potential ramifications of a more recent supreme court response to an unpublished decision of the court of appeals. In May 1993, the court of appeals issued its first decision in *Arnold v DMR Financial Services* (No. 90-00778), a case in which the mortgagor challenged foreclosure of a mortgage that had been assigned to the Guaranty National Mortgage Association (GNMA). The RJA provides in part that as a condition of foreclosing by advertisement, "the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all assignments thereof shall have been recorded." In accordance with standard GNMA procedures, the assignment had not been recorded, and Ms. Arnold challenged the foreclosure on the basis that not all assignments had been recorded. The court of appeals initially ruled against Ms. Arnold, saying that the mortgage had not been harmed by the failure to record, and that there was no reason to void the sale. Ms. Arnold appealed to the supreme court, which, instead of granting leave to appeal, remanded the case to the court of appeals for reconsideration in

light of *Senters*. The court of appeals, citing *Senters*, subsequently ruled in favor of Ms. Arnold, ruling the foreclosure sale void because the assignment to GNMA had not been recorded as required by the RJA. The case is now being appealed to the supreme court, which has not yet decided whether to grant leave to appeal.

The decision has raised concern among mortgage experts, who say that the purpose of the statutory requirement to record assignments of a mortgage is to ensure that the entity publishing the notice holds record title to the property. Thus, someone facing foreclosure can go to the register of deeds to find out who are the parties with whom the person must negotiate to retain his or her property. GNMA assignments, on the other hand, do not operate to transfer title; assigning a mortgage to GNMA means that GNMA guarantees that purchasers of the mortgage on the secondary mortgage market will receive payments due from the original mortgagee/lender. Mortgage payments continue to be collected by the original mortgagee/lender from the mortgagor/borrower, and it is to this lender, not GNMA, that foreclosure powers belong. Critics point out that for statute to require that an assignment to GNMA be recorded would be to saddle GNMA with administrative duties it neither wants nor can manage.

To address concerns raised by the *Senters* decision and subsequent court action, amendments to foreclosure procedures have been proposed.

THE CONTENT OF THE BILL:

The bill would amend Chapter 32 of the Revised Judicature Act to:

** delete a requirement that all assignments of a mortgage must have been recorded as a prerequisite for foreclosure.

** state that the party foreclosing the mortgage must be either the owner of the indebtedness (or of an interest in it) or the servicer of the mortgage. If the party foreclosing is not the original mortgagee, the mortgage would have to have been assigned of record to the party foreclosing the mortgage.

** require someone redeeming property sold at a foreclosure sale to reimburse the purchaser for amounts paid to redeem senior liens from foreclosure.

MCL 600.3204 et al.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill has no fiscal implications. (9-19-94)

ARGUMENTS:

For:

The bill would provide a speedy resolution to problems raised by recent court decisions. Of particular concern is a court of appeals decision that all mortgage assignments must be recorded with the register

of deeds in order for a foreclosure to go forward. For mortgages that have been sold on the secondary mortgage market, especially those backed by GNMA ("Ginnie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal National Mortgage Association ("Fannie Mae"), the decision of the court of appeals is problematic: these entities almost invariably merely have a security assigned to them, not a record title. They do not have, nor are they in a position to assume, the role played by the original mortgagee, who services the mortgage and proceeds with any foreclosure. By eliminating an overbroad requirement for all assignments to be recorded, and by linking foreclosure authority to mortgage servicing (with certain exceptions for flexibility), the bill would better reflect the real world of mortgage finance.

For:

The bill would require someone redeeming property from foreclosure to reimburse the purchaser for any amounts paid to discharge senior liens (such as construction liens) from foreclosure. The bill thus would restore a basic fairness to the law, enabling foreclosure purchasers to receive sums they paid out to lienholders.

Against:

There is a public interest in seeing redemptions go forward; people facing temporary hardship should

have every reasonable chance to keep their homes. The bill, by adding to the sums that would have to be reimbursed by people trying to redeem their homes following foreclosure, would tend to make redemption more expensive and thus more difficult to do.

POSITIONS:

The Financial Institutions Bureau supports the bill. (9-16-94)

The Michigan Land Title Association supports the bill. (9-16-94)

The Michigan League of Savings Institutions supports the bill. (9-16-94)

Michigan Legal Services has concerns about the bill, and does not support it at this time. (9-16-94)

[LOGO] **House Legislative Analysis Section**

Olds Plaza Building,
10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

FORECLOSURE BY ADVERTISEMENT

House Bill 5721 as enrolled
Public Act 327 of 1994
Second Analysis (2-15-95)

Sponsor:
Rep. Gary L. Randall
House Committee:
Business and Finance
Senate Committee:
Corporations and
Economic Development

THE APPARENT PROBLEM:

The Revised Judicature Act (RJA) sets forth the procedures for foreclosing by advertisement, by far the most common method of foreclosure, which involves publication and posting of foreclosure and sale notices. (For simplicity, this analysis will refer to "foreclosure" to mean foreclosure by advertisement under the applicable article of the Revised Judicature Act.) Recent decisions of the Michigan Supreme Court have suggested that the foreclosure procedures of the act must be strictly followed.

In its 1993 decision on *Senters v Ottawa Savings Bank* (443 Mich 45), the court held that foreclosure sales by advertisement are defined and regulated by statute. The court said that once a mortgagee elects to foreclose by this method, Chapter 32 of the Revised Judicature Act governs the prerequisites of the sale, notice of foreclosure and publication, mechanisms of

the sale, and redemption. This reasoning was used to uphold a former mortgagor's redemption of property from the foreclosure sale purchaser (who was also the original mortgagee, or mortgage lender) without reimbursing the mortgagee/purchaser for a construction lien it had paid following its purchase of the property at its own foreclosure sale. Since statute did not require reimbursement for such liens under such circumstances, the property could be redeemed without the mortgagor paying that sum in addition to the statutorily-prescribed amounts.

Of more urgent concern to many, however, are the potential ramifications of a more recent supreme court response to an unpublished decision of the court of appeals. In May 1993, the court of appeals issued its first decision in *Arnold v DMR Financial Services* (No. 90-00778), a case in which the mortgagor challenged foreclosure of a mortgage that had been assigned to the Guaranty National Mortgage Association (GNMA). The RJA provides in part that as a condition of foreclosing by advertisement, "the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all assignments thereof shall have been recorded." In accordance with standard GNMA procedures, the assignment had not been recorded, and Ms. Arnold challenged the foreclosure on the basis that not all assignments had been recorded. The court of appeals initially ruled against Ms. Arnold, saying that the mortgage had not been harmed by the failure to record, and that there was no reason to void the sale.

Ms. Arnold appealed to the supreme court, which, instead of granting leave to appeal, remanded the case to the court of appeals for reconsideration in light of *Senters*. The court of appeals, citing *Senters*, subsequently ruled in favor of Ms. Arnold, ruling the foreclosure sale void because the assignment to GNMA had not been recorded as required by the RJA. The case is now being appealed to the supreme court, which has scheduled oral arguments for early March 1995.

The decision has raised concern among mortgage experts, who say that the purpose of the statutory requirement to record assignments of a mortgage is to ensure that the entity publishing the notice holds record title to the property. Thus, someone facing foreclosure can go to the register of deeds to find out who are the parties with whom the person must negotiate to retain his or her property. GNMA assignments, on the other hand, do not operate to transfer title; assigning a mortgage to GNMA means that GNMA guarantees that purchasers of the mortgage on the secondary mortgage market will receive payments due from the original mortgagee/lender. Mortgage payments continue to be collected by the original mortgagee/lender from the mortgagor/borrower, and it is to this lender, not GNMA, that foreclosure powers belong. Critics point out that for statute to require that an assignment to GNMA be recorded would be to saddle GNMA with administrative duties it neither wants nor can manage.

To address concerns raised by the *Senters* decision and subsequent court action, amendments to foreclosure procedures have been proposed.

THE CONTENT OF THE BILL:

The bill would amend Chapter 32 of the Revised Judicature Act to:

** Delete a requirement that all assignments of a mortgage must have been recorded as a prerequisite for foreclosure.

** State that the party foreclosing the mortgage must be either the owner of the indebtedness (or of an interest in it) or the servicing agent of the mortgage. If the party foreclosing is not the original mortgagee, there would have to be a record chain of title evidencing the assignment of the mortgage to the party foreclosing the mortgage.

** Require someone redeeming property sold at a foreclosure sale to reimburse the purchaser for amounts paid to redeem senior liens from foreclosure. If the redemption payment included an amount used to redeem a senior lien from a nonjudicial foreclosure, the mortgagor would have the same defenses against the purchaser with respect to the amount used to redeem the senior lien as the mortgagor would have had against the senior lien.

MCL 600.3204 et al.

FISCAL IMPLICATIONS:

The Senate Fiscal Agency has reported that the bill would not have a regulatory or fiscal impact on the Department of Commerce or on other agencies of state government. No mandated costs would be imposed on local governmental units. (12-1-94)

ARGUMENTS:

For:

The bill would provide a speedy resolution to problems raised by recent court decisions. Of particular concern is a court of appeals decision saying that all mortgage assignments must be recorded with the register of deeds in order for a foreclosure to go forward. For mortgages that have been sold on the secondary mortgage market, especially those backed by GNMA ("Ginnie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal National Mortgage Association ("Fannie Mae"), the decision of the court of appeals is problematic: these entities almost invariably merely have a security assigned to them, not a record title. They do not have, nor are they in a position to assume, the role played by the original mortgagee, who services the mortgage and proceeds with any foreclosure. By eliminating a confusingly overbroad provision for all assignments to be recorded, and by linking foreclosure authority to mortgage servicing (with certain exceptions for flexibility), the bill would better reflect the real world of mortgage finance.

For:

The bill would require someone redeeming property from foreclosure to reimburse the purchaser for any amounts paid to discharge senior liens (such as construction liens) from foreclosure. The bill thus would restore a basic fairness to the law, enabling foreclosure purchasers to receive sums they paid out to lienholders.

Against:

There is a public interest in seeing redemptions go forward; people facing temporary hardship should have every reasonable chance to keep their homes. The bill, by adding to the sums that would have to be reimbursed by people trying to redeem their homes following foreclosure, would tend to make redemption more expensive and thus more difficult to do.

APPENDIX D

STATE OF MICHIGAN

MIKE COX, ATTORNEY GENERAL

MORTGAGES: Necessity of recording mortgages before initiating foreclosure by advertisement

RECORDS AND RECORDATION:

A mortgagee cannot validly foreclose a mortgage by advertisement unless the mortgage and all assignments of that mortgage (except those assignments effected by operation of law) are entitled to be, and have been, recorded. In a foreclosure of a mortgage by advertisement, an assignee who holds the mortgage at the time the foreclosure proceedings commence must be named in the published notice of sale. If a foreclosing mortgagee or assignee does not have a recorded interest on the date the foreclosure by advertisement commences, the notice given by advertisement does not satisfy the statutory requirements for publication and may be the basis for asserting that the mortgage has not been validly foreclosed.

Opinion No. 7147

January 9, 2004

Honorable Michael D. Bishop
State Senator
The Capitol
Lansing, MI 48909

You have asked: a) whether a mortgagee initiating foreclosure of a mortgage by advertisement must have a duly recorded and complete chain of title to the

mortgage being foreclosed before the mortgagee commences advertising the sale; and b) if a foreclosing mortgagee does not have a recorded interest as of the date on which foreclosure by advertisement commences, whether this omission renders any subsequent sale voidable by the mortgagor or a party claiming through the mortgagor.

The foreclosure of a mortgage by advertisement is governed by Chapter 32 of the Revised Judicature Act (RJA), MCL 600.3201 through 600.3280. MCL 600.3204 provides in pertinent part:

> (1) A party may foreclose by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) A suit or proceeding has not been instituted, at law, to recover the debt then remaining secured by the mortgage, or any part of the mortgage; or if a suit or proceeding has been instituted, the suit or proceeding has been discontinued; or an execution upon the judgment rendered in a suit or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded and, *if the party foreclosing is not the original mortgagee, a record chain of title exists evidencing the assignment of the mortgage to the party foreclosing the mortgage.*

> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage. [Emphasis added.]

MCL 600.3208 provides:

> Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county. In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.

The Michigan Land Title Standards (5th Edition) published by the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan is an authoritative source that has been relied upon by property law practitioners in Michigan for nearly 50 years. Michigan Land Title Standard 16.12 relates to your question and recites:

> STANDARD: A MORTGAGE CANNOT BE VALIDLY FORECLOSED BY ADVERTISEMENT UNLESS THE MORTGAGE AND

> ALL ASSIGNMENTS THEREOF, EXCEPT SUCH ASSIGNMENTS AS HAVE BEEN EFFECTED BY OPERATION OF LAW, ARE ENTITLED TO BE, AND HAVE BEEN RECORDED.

The committee then illustrates how the standard applies by setting forth the following hypothetical problem, an answer to that problem, and the legal authority that supports that answer:

> Problem A: Robert Brown mortgaged Blackacre to Edward Lane. Lane assigned the mortgage to Arthur Mills. The assignment was either unrecorded or, although actually recorded, was not entitled to be recorded. Mills foreclosed the mortgage by advertisement and a sheriff's deed purporting to convey Blackacre was recorded. Was the foreclosure valid?
>
> Answer: No. To foreclose a mortgage by advertisement validly, the mortgage and all assignments thereof must be entitled to record and be recorded.

The standard cites MCL 600.3204(3) and *Dohm v Haskin*, 88 Mich 144; 50 NW 108 (1891), as support for its answer.

As the Michigan Supreme Court in *Dohm* explained, "the right to foreclose by advertisement is conferred solely by the statute, and its provisions must be strictly complied with. Under this statute, the mortgage and assignment must not only be recorded,

but they must be executed in such a manner as to entitle them to record." 88 Mich at 147.

In the *Dohm* case, the assignment of the mortgage was executed in Kansas. It had only one witness. It purported to be acknowledged before a notary public. No certificate of a clerk or proper certifying officer of a court of record was attached as required by the then effective statutes. How. Stat. § 5660. As the Court indicated, the instrument "was therefore not entitled to record, and the register of deeds should have refused to record it." *Id.*

Another relevant provision of the RJA is MCL 600.3212, which states:

> Every notice of foreclosure by advertisement shall include all of the following:
>
> (a) The *names of* the mortgagor, the mortgagee, and *the foreclosing assignee of a recorded assignment of the mortgage*.
>
> (b) The date of the mortgage and the date the mortgage was recorded.
>
> (c) The amount claimed to be due on the mortgage on the date of the notice.
>
> (d) A description of the mortgaged premises that substantially conforms with the description contained in the mortgage.
>
> (e) For a mortgage executed on or after January 1, 1965, the length of the redemption period as determined under section 3240. [Emphasis added.]

Michigan Land Title Standard 16.18 states:

> STANDARD: IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT, AN ASSIGNEE WHO HOLDS THE MORTGAGE AT THE TIME OF FORECLOSURE MUST BE NAMED IN THE PUBLISHED NOTICE OF SALE.

This standard is explained by the committee with the following problem and answer:

> Problem: A mortgage was assigned of record to Arthur Mills. Mills foreclosed it by advertisement. The published notice of sale did not set forth the assignment. Is the notice sufficient?
>
> Answer: No. The statute requires that the assignee be named in the notice.

The committee cites MCL 600.3212 as the authority supporting this answer.

Neither of the quoted land title standards addresses directly the factual scenario where a mortgagee or a mortgagee's assignee initiates foreclosure by advertisement, but the initial published notification either fails to name the assignee, or, while naming the assignee, names an assignee who is not of record. This scenario raises the question whether a mortgagee or mortgagee's assignee under these circumstances can cure the error by recording the assignment and naming the assignee in subsequent notices published before the sheriff conducts the sale involved.

With respect to the attempt to cure the omissions in the first of the successive required publications, a faulty initial publication cannot be offered as satisfying the RJA's publication requirements. The first *correct* publication is the first publication that can be relied upon in asserting that publication has been properly accomplished for four successive weeks.

With respect to the assignment of a mortgage after the initial publication, it is my understanding that the State Bar Land Title Standards Committee, in editing Michigan Land Title Standard 16.18 for future publication, has added a "Comment C," which will recite:

> The Committee expresses no opinion as to the effect of an assignment of the foreclosing assignee's interest after the publication of the initial notice of sale.

In other words, the Committee's future publication will decline to address this factual scenario in the absence of sufficient statutory or case authority.

The State Bar Land Title Standards Committee's comment confirms that this is an area in need of legislative treatment. Since, as stated in *Dohm*, the right to foreclose by advertisement "is conferred solely by . . . statute," I must also defer to the legislative process to address this gap in the law. Indeed, you have indicated in your letter that you are concerned that not all mortgagees are following the same practice in this area and that you plan to deal with

this and related problems by proposing appropriate legislation to bring needed clarity to the issue.

It is my opinion, therefore, that a mortgagee cannot validly foreclose a mortgage by advertisement unless the mortgage and all assignments of that mortgage (except those assignments effected by operation of law) are entitled to be, and have been, recorded. In a foreclosure of a mortgage by advertisement, an assignee who holds the mortgage at the time the foreclosure proceedings commence must be named in the published notice of sale. If a foreclosing mortgagee or assignee does not have a recorded interest on the date the foreclosure by advertisement commences, the notice given by advertisement does not satisfy the statutory requirements for publication and may be the basis for asserting that the mortgage has not been validly foreclosed.

MIKE COX
Attorney General

Editor's Note: After OAG No 7147 was released, 2004 PA 186 was enacted into law and given immediate effect (July 1, 2004). This act amended MCL 600.3204(3) to provide: "If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage." Accordingly, OAG No 7147 has been superseded by subsequent legislative action.